No. _____

IN THE

Supreme Court of the United States

KENNY D. HASSEY,

Petitioner,

v.

CITY OF OAKLAND,

Respondent.

On Petition for Writ of Certiorari to the California Court of Appeal for the First District

PETITION FOR WRIT OF CERTIORARI

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December 15, 2008

QUESTIONS PRESENTED

1. Whether the Fair Labor Standards Act (29 U.S.C. § 201, *et seq.*), precludes employers from passing their cost of in-house training to employees through the use of a "training cost reimbursement agreement" where the parties purport to authorize the employer to withhold the employee's final paycheck and/or to sue the employee for breach of contract should the employment relationship terminate before a specified date.

2. Whether the California Court of Appeal impermissibly departed from a well-established federal policy enunciated by the regulations and interpretations of the Administrator for the Wage and Hour Division of the United States Department of Labor that conclude that the "free and clear" payment requirement of the Fair Labor Standards Act (29 C.F.R. § 531.35) renders unenforceable an employer mandated training reimbursement agreement where the amount of the reimbursement sought deprives the employee of the federal minimum wage.

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 14.1 and Rule 29.6, the following list identifies all of the parties appearing here and in the court below:

The Petitioner here and in the California Court of Appeal is Kenney D. Hassey, a U.S. citizen. Individuals Matthew Delorenzo and Chris Baker, withdrew their appeals. They are not parties to this proceeding.

The Respondent here and in the California Court of Appeal is the City of Oakland, a municipal corporation. Richard Word, Chief of Police, for the City of Oakland was a respondent in the Court of Appeal but was dismissed from this action and is not a party to this proceeding.

TABLE OF CONTENTS

TABLE OF AUTHORITIES
Federal Cases

United States Code

Code of Federal Regulations

U.S. Department of Labor Wage and Hour Opinion Letters

Other Authorities

INTRODUCTION

In this matter, the California Court of Appeal affirmed a trial court's grant of summary judgment to an employer seeking to enforce a "training cost reimbursement agreement." Under the agreement, the City of Oakland, (hereinafter "the City" or "the employer") required the employee, petitioner Kenny D. Hassey, to pay it $8,000 to cover costs the City attributed to training the petitioner at its police academy as the petitioner had terminated his employment with the City before serving a requisite five years of employment. In partial satisfaction of the $8,000 reimbursement, the City withheld the petitioner's two final paychecks and sued him for the remaining $6,619.92.

In upholding the trial court's entry of judgment for the employer, the California Court of Appeal held that the training cost reimbursement scheme was akin to an employer's incentive plan and was enforceable. The court concluded that the petitioner had not established a deprivation of the Fair Labor Standards Act (29 U.S.C. § 201, *et seq.*, hereinafter "FLSA"). Yet, inexplicably, the court remanded the petitioner's countersuit antithetically holding that the employer's seizure of the petitioner's paycheck could constitute an FLSA violation.[1]

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[1] After affirming the entry of judgment in favor of the City, the California Court of Appeal remanded the petitioner's countersuit brought under the FLSA for a determination as to whether the City's withholding of petitioner's paychecks may be barred by the FLSA's 2 or 3 year statute of limitations.

Such an outcome is both nonsensical and contravenes the well established, uniform federal policy enunciated by the regulations and interpretive letters of the Administrator of the Wage and Hour Division of the United States Department of Labor. The decision overturns the requirement of 29 C.F.R. § 531.35 mandating an employer to pay wages "free and clear" and "unconditionally." Similarly, the decision eviscerates a series of Wage and Hour Opinion Letters issued by the Administrator that have uniformly applied this regulation to invalidate any training repayment agreement where the obligation exceeds the federal minimum wage earned in the employee's final work week. The regulation and opinion letters, both entitled to controlling weight, form a coherent, national policy that requires employers to bear the costs of training their employees. As the primary beneficiary of the training, employers cannot transfer such costs to their employees.

Absent review by this Court, serious doubt is cast upon the Department of Labor's national policy. Moreover, because economic realities generally leave the employee unable to enter into meaningful negotiations with an employer, the employer will typically exercise unfettered discretion to determine not only the amount of any training reimbursement, but the requisite service commitment required of the employee. As there is no concomitant promise by the employer to keep the employee employed during this same period, the employee effectively suffers under the burden of a debt for which he/she is not the primarily beneficiary, and works more like an indentured servant than motivated by any incentive plan.

OPINIONS BELOW

The orders and judgment of the California Superior Court (per Smith, J.), granting the respondent's motion for summary judgment and denying petitioner relief on his cross-motion for summary judgment are reprinted at App. 43a-47a and 48a-52a, respectively. The judgment of the trial court entered thereon is reprinted at App. 53a-59a. None of the trial court orders nor the judgment is published.

The decision of the California Court of Appeal, First District, (per Sepulveda, J.), is reprinted at App. 1a-42a. It was modified and petition for rehearing was denied on July 15, 2008 and again on July 17, 2008. Both modifications are found at App. 60a-61a and 62a-63a, respectively. The decision, as modified, is published at 163 Cal.App.4th 1477, 78 Cal.Rptr.3d 621.

JURISDICTION

The original decision of the California Court of Appeal was rendered on June 17, 2008, and was modified with no change in decision following the court's denial of the petition for rehearing on July 15, 2008 and July 17, 2008. The California Supreme Court denied a petition for review on September 17, 2008, reprinted at App. 64a. The petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTES, REGULATIONS, WAGE AND HOUR ADMINISTRATOR INTERPRETATIONS AND REPAYMENT POLICIES INVOLVED

Tile 29, Section 206(a)(1) of the United States Code states in pertinent part:

> Every employer shall pay to each of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the production of goods for commerce, wages at the following rates: (1) except as otherwise provided in this section . . . not less than $5.15 an hour beginning September 1, 1997.

Title 29, Section 531.3(d) of the United States Code of Federal Regulations, portions of which are reprinted at App. 92a that states in pertinent part:

> (2) The following is a list of facilities found by the Administrator to be primarily for the benefit of convenience of the employer. The list is intended to be illustrative rather than exclusive: (i) Tools of the trade and other materials and services incidental to carrying on the employer's business . . . .

Title 29, Section 531.32 of the United States Code of Federal Regulations, portions of which are reprinted at App. 93a-94a, states in pertinent part:

> (c) It should also be noted that under Sec. 531.3(d)(1), the cost of furnishing ``facilities'' which are primarily for the benefit or convenience of the employer will not be recognized as reasonable and may not therefore be included in computing wages.

Title 29, Section 531.35 of the United States Code of Federal Regulations, reprinted at App. 95a that states in pertinent part:

> Whether in cash or in facilities, "wages" cannot be considered to have been paid by the employer and received by the employee unless they are paid finally and unconditionally or "free and clear." The wage requirements of the Act will not be met where the employee "kicks-back" directly or indirectly to the employer or to another person for the employer's benefit the whole or part of the wage delivered to the employee.

Title 29, Section 778.104, reprinted at App. 96a, that states in pertinent part:

> The Act takes a single workweek as its standard and does not permit averaging of hours over 2 or more weeks.

United States Department of Labor, Wage and Hour Opinion Letter, dated October 21, 1992 (1992 WL 845111), fully reprinted at App. 65a-67a, states in part:

> The wage requirements of the FLSA will not be met where the employee "kicks-back" directly or indirectly to the employer . . .the whole or part of the wage delivered to the employee.

United States Department of Labor, Wage and Hour Opinion Letter, dated September 3, 1999, (1999 WL 1788152), fully reprinted at App. 68a-70a, states pertinent in part:

> [T]he return to the employer of compensation due an employee under the FLSA would violate the statute. It is our opinion that, where a repayment plan would result in an employee receiving less than the wages required by the FLSA, it would violate the provisions of the FLSA.

United States Department of Labor, Wage and Hour Opinion Letter, dated September 30, 1999, (1999 WL 1788162), fully reprinted at App. 71a-74a, provides, in part:

> The United States Supreme Court has held that an employee may not waive his or her rights to compensation due under the FLSA. *Brooklyn Savings Bank v. O'Neil*, 328 U.S. 697 (1945). Similarly, in

> *Barrentine v. Arkansas-Best Freight System*, 450 U.S. 728 (1981), the Supreme Court held that a labor organization may not negotiate a provision that waives employees' statutory rights under the FLSA. Consequently, the return to the employer of compensation due an employee under the FLSA would violate the statute.

United States Department of Labor, Wage and Hour Opinion Letter, dated May 31, 2005, (2005 WL 2086807), fully reprinted at App. 75a-79a, concludes:

> It is thus our opinion that any reimbursement paid by the officer that will result in payment of less than the amount required by the applicable minimum wage and/or overtime requirements will violate the "free and clear" provisions of the FLSA.

That portion of the Memorandum of Understanding ("MOU") between the City of Oakland and the Oakland Police Officers' Association, ("OPOA") entitled, "Police Officer Trainee Training Costs" reprinted at App. 80a-81a, states in part:

> The purpose of this provision is to insure that the recruit either accept a commitment of service to the City or be responsible for costs associated with Academy training. Thus the parties agree that any member who, prior to

> completing five years of service, voluntarily separates from service with the department shall be responsible for reimbursing the City, on a full or prorata basis, for the $8,000 cost of his or her training at the Police Academy.

The "Conditional Offer of Position as a Police Officer Trainee with the City of Oakland," dated December 10, 1997, fully reprinted at App. 82a-85a, states:

> The City of Oakland Police Department hereby notifies you that you have been selected for a position as a Police Officer Trainee, subject to the following conditions: you . . . accept the training reimbursement provisions specified below. . . .Before the end of year 1 - 100% repayment of $8,000
>
> Before the end of year 2 - 80% repayment of $8,000
>
> Before the end of year 3 - 60% repayment of $8,000
>
> Before the end of year 4 - 40% repayment of $8,000
>
> Before the end of year 5 - 20% repayment of $8,000

The "Training Cost Repayment Agreement," dated February 16, 1999, reprinted at App. 86a-87a, states in pertinent part:

> In accordance with the Memorandum of Understanding between the City of Oakland and the Oakland Police Officers' Association, I hereby acknowledge that I am obligated to repay the City of Oakland for training costs incurred while I was employed as a Police Officer Trainee. The total amount owed to the City of Oakland is $8,000, minus the amount of my final paycheck in the amount of $ 0 leaving a balance of $8,000.00.

STATEMENT OF THE CASE

A. Factual Background

Municipal agencies such as the City of Oakland are required by the State of California, Commission on Peace Officers Standards of Training, ("POST") to deploy only those persons who have completed a POST certified police academy.[2]

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[2] *See*, Cal. Penal Code §§ 832(a), "Every person described in this chapter as a peace officer shall satisfactorily complete an introductory course of training prescribed by the Commission on Peace Officer Standards and Training." *See also:* Cal. Pen. C. § 13510, generally authorizing POST to create and monitor peace officer training regimens; 11 Cal. Code Regs. § 1005(a)(1), " Every peace officer, except Reserve Levels II and III, those peace officers listed in Regulation 1005(a)(3) [peace officers whose primary duties are investigative], and 1005(a)(4) [coroners or deputy

In order to encourage newly recruited police officers trainees to stay in the employ of the City of Oakland, the City and the OPOA, the collective bargaining unit for Oakland police officers, entered into an agreement whereby those who were hired by the City as "Police Officer Trainees" were required to reimburse the City for its costs of training these persons at the City's in-house police academy. This sum was stipulated to be $8,000.

The agreement, reprinted at App. 80a-81a, required the recruit to remain in the employment of the City's police department for a period of five years in order to work off the entire $8,000 repayment obligation. For each full year the employee served in the police department's employ, the obligation was reduced by twenty percent. The obligation was imposed for any reason the employee separated employment with the police department. Further, the agreement between the City and the OPOA did not guaranty the employee any contractual right to continued employment with the City.

Concluding, this provision of the MOU stipulated that the repayment obligation, "shall be due and payable at the time of separation and the City shall deduct any amounts owed under this provision from the employees final paycheck." Any shortage was agreed to be "thereupon due and owing." (App. 81a.)

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coroners], shall complete the Regular Basic Course before being assigned duties which include the exercise of peace officer powers. Requirements for the Regular Basic Course are set forth in PAM, section D-1-3."

In the Fall of 1997, petitioner was desirous of becoming a police officer. He applied and completed a series of entrance examinations including physical agility and mental acuity testing and an oral interview. He did well and was sent a letter from the City's police department entitled, "Conditional Offer of Position as a Police Officer Trainee with the Oakland Police Department," reprinted at App. 82a-85a. This letter contained the following:

> Reimbursement provisions: You may be required to reimburse the City of Oakland for training expenses. Reimbursement would be required in the event you voluntarily terminate your employment with the Oakland Police Department, according to the following schedule:
>
> Before the end of year 1 -
> 100% repayment of $8,000
>
> Before the end of year 2 -
> 80% repayment of $8,000
>
> Before the end of year 3 -
> 60% repayment of $8,000
>
> Before the end of year 4 -
> 40% repayment of $8,000
>
> Before the end of year 5 -
> 20% repayment of $8,000

In order to receive the position, the petitioner was required to execute the terms of the reimbursement agreement or the City would not continue to process his application for employment. Petitioner signed the "Conditional Offer" on December 10, 1997. On March 16, 1998, the petitioner was hired by the City as a police officer trainee and was directed to attend the City's police academy. The petitioner was again required to sign an acknowledgment entitled "reimbursement of training expenses" that restated the reimbursement obligation contained in the "Conditional Offer."

The City's police academy was certified by California POST. It was owned, operated, staffed and managed entirely by the City of Oakland. While other state certified academies exist that have significantly lower costs to those attending, the City had a policy of sending its police trainees to its own police academy. Petitioner had no choice in the matter.

The petitioner graduated the police academy in November 1998. Despite this success, once the petitioner was assigned to his initial patrol assignment, his field training officer ("FTO") noted deficiencies in his performance. In February 1999, the FTO suggested that the petitioner resign in lieu of termination owing to continuing performance deficiencies. The petitioner followed this advice and resigned on February 10, 1999. He has not worked as a police officer since.

As the petitioner was concluding his employment, the City presented the petitioner with a document entitled, "Training Cost Repayment Agreement." This document restated the reimbursement obligation of the MOU and asserted that the City was due $8,000 from the petitioner for the training it had provided him. It set out a proposed installment plan for the repayment of the obligation. (App. 86a-87a). The petitioner signed this document on February 16, 1999.

For his final work week ending February 19, 1999, the petitioner's paycheck reveals he worked 40 hours and earned one hour of compensatory time. (App. 88a-89a) This resulted in a gross income of $935.76 (40 x $23.39400 per hour). The net amount of this check after deductions was $725.28.

In April 1998, the City issued another check to the petitioner for retroactive pay. (App. 90a-91a) This check represented gross pay in the amount of $1,014.42, with net pay being $654.80. However, pursuant to the MOU, the City withheld both checks and applied their net sums to reduce the $8,000 reimbursement obligation claimed by the City.[3]

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[3] The judgment entered against the petitioner in the amount of $6,619.92 was calculated by the trial court as follows: $8,000 less ($725.28 + $654.80) + $100 "collection fee" sought by the City.

B. Procedural History

On October 17, 2001, the City sued the petitioner for breach of contract in the Superior Court of California, County of Alameda. On May 10, 2002, the petitioner filed his answer and countersued the City.

In his answer, the petitioner alleged as an affirmative defense that the FLSA, and more specifically 29 C.F.R. § 531.35, trumped enforcement of the alleged contract for reimbursement. Similarly, in his countersuit, he averred, among other claims, that the City's withholding of his final paychecks violated the FLSA. Owing to the petitioner's military deployment, the case was stayed for a period of time. Ultimately, the City and the petitioner completed discovery and filed cross-motions for summary judgment in the Fall of 2006.

The trial court granted the City's motion in its totality, concluding that there was no genuine dispute since the petitioner admitted signing the reimbursement obligation acknowledgments and not repaying the City its claimed training costs. (App. 44a). The trial court specifically rejected petitioner's argument that the City's reimbursement agreement obligation resulted in conditional payment of wages in violation of 29 C.F.R. § 531.35. (App. 45a-46a)

In granting the City's motion and denying the petitioner's cross-motion, the trial court adopted the City's argument that the outcome was controlled by the decision in *Heder v. City of Two Rivers, Wisconsin*, 295

F.3d 777, 782-783, stating, "The *Heder* decision clearly holds that a requirement that employees reimburse certain training costs if they resign before the employer receives its intended benefit from the training does not violate the FLSA." (App. 50a)

The trial court further dismissed the application of the Administrator's Wage and Hour Opinion Letters, stating:

> During oral argument, counsel [for petitioner] argued that three United States Department of Labor opinion letters clearly support [petitioner's] position. Having reviewed the opinion letters again, the Court does not agree with counsel's argument. The 1992 and 2005 opinion letters are not applicable because the alleged policies challenged therein require police officers to reimburse the salaries that they were paid during the period of their training. The policy of the State of Washington challenged in the 1999 opinion letter appears to be similar to the City's reimbursement policy, but it is not clear from the brief opinion that the employees are required to reimburse training costs only and not salary paid during training.[4]

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[4] The court refers to that Wage and Hour Op. Ltr., dated September 30, 1999, (1999 WL 1788162) reprinted at App. 71a-74a.

Judgment was entered against the petitioner and in favor of the City on October 5, 2006. (App. 53a-59a). Timely appeal was taken to the First District Court of Appeal for California. On June 17, 2008, the Court of Appeal affirmed enforcement of the City's reimbursement agreement. The court rejected the petitioner's argument that the "free and clear" and "unconditional" payment requirements of 29 C.F.R. § 531.35 voided the reimbursement obligation. Like the trial court, the Court of Appeal found the decision in *Heder* controlling. (App. 10a)

The appellate court held the City of Oakland's training reimbursement agreement analogous to that upheld by the Seventh Circuit Court of Appeal in *Heder* where that court had likened a fire fighter training reimbursement obligation to "other valid incentives that employers offer their workers to stay with them." (App. 11a, *Heder* at 780-781) The court concluded:

> Likewise here, Oakland was permitted to seek reimbursement from police officers who gained the benefit of its training program at the Oakland Police Academy but did not stay with the police department long enough for Oakland to benefit from that training. (App. 11a)

Like the trial court, the Court of Appeal rejected application of any Wage and Hour Opinion Letter authored by the Secretary of Labor. (App. 12a)

In applying *Heder*, the Court of Appeal noted that Wage and Hour, Op. Ltr., dated May 31, 2005, had referenced the decision in *Heder,* "albeit for a different point." Consequently, the Court of Appeal erroneously concluded that this was, "[A]n indication that the Department of Labor would not disapprove of the type of reimbursement agreement at issue there." (App. 12a)

The Court of Appeal concluded that the petitioner had not established that the reimbursement agreement constituted a violation of the FLSA. This conclusion was based on the fact no evidence was presented that showed that the City had deducted the $8,000 in any work week, or had deducted training costs from the petitioner's paychecks as these were incurred in the course of training. (App. 15a)

However, the Court of Appeal went on to conclude that the City's withholding of the petitioner's final paycheck was not permitted under the FLSA. On this point the court stated, "As Hassey correctly notes, the FLSA mandates that employers such as Oakland pay their employees at least the statutory federal minimum wage. . . That means, quite simply, that Hassey was entitled to at least the statutory minimum wage for the final pay period he worked." (App 18a-19a)[5]

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[5] The court further concluded that the trial court had erroneously held that the relief under the FLSA for this violation was precluded by the two year statute of limitations. It remanded that portion of the petitioner's countersuit for a determination as to whether the City's withholding of the petitioner's check was

The Court of Appeal modified the opinion and denied rehearing on July 15, 2008, (App. 60a-61a) and on July 17, 2008, (App. 62a-63a) with no change in judgment. The California Supreme Court denied review on September 17, 2008. (App. 64a)

REASONS FOR GRANTING THE WRIT

This petition should be granted for two reasons. First, the California Court of Appeal's decision invites employers and courts alike into error by focusing the inquiry on the method by which the employer passes the training cost to the employee. This approach is flawed. As acknowledged by a recent district court opinion, "The relevant issue under the FLSA is not the method of passing a cost along to the employee, but whether the cost is one that may be passed along at all." *Rivera v. Brickman Group, Ltd.*, 155 Lab Cas. P. 35,388 (E.D. Pa. 2008)

Moreover, in its reliance on the holding of *Heder*, the decision below erroneously validates training reimbursement agreements under the FLSA, not on a detailed analysis of decisions, regulations and interpretive letters applying the FLSA to such agreements, but on a discussion arising from what the Seventh Circuit summarized as "Heder depict[ing] a repayment obligation as a covenant not to compete that is invalid under Wis. Stat § 103.465." *Heder* pg. 780.

"wilful" within the meaning of 29 U.S.C. § 255(a), see App. 25a-27a.

To the extent that the Seventh Circuit did conduct a review of the reimbursement agreement presented therein under the FLSA, the court stated the following:

> "What else needs to be repaid [to the City of Two Rivers]? The [reimbursement agreement] seems to call for the repayment of the overtime compensation, but as we have already observed, this violates the FLSA to the extent that it would leave Heder with less than time and a half for all overtime hours." *Heder* pg. 782.

Thus, it becomes apparent that the decision below is woefully flawed in its analysis. Nonetheless, this decision will lead employers and courts alike to incorrectly assume that it is the *method* by which employers impose training reimbursement obligations on their employees that is the dispositive factor to a determination of enforceability. Unless resolved by this Court, more and more employers will impose such obligations; the cumulative effect being whole classes of employees will lose their minimum wage protections at a time that wages are stagnating or are declining.

Second, because Congress never addressed the specific issue as to whether an employer may seek to recover training costs from employees in the statutes of the FLSA itself, the Administrator of the Wage and Hour Division of the Department of Labor has adopted a detailed and thoughtful scheme of regulations and interpretive letters that resolve the question.

As noted by this Court, "If Congress has explicitly left a gap for the agency to fill, there is an express delegation of authority to the agency to elucidate a specific provision of the statute by regulation. Such legislative regulations are given controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute. *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.* 467 U.S. 837, 843-844 (1984).

Here, the Administrator adopted regulations defining what costs could permissibly be passed on to the employee by defining what costs would be considered "wages" if these were paid by the employer and counted as a credit against the federal minimum wage. (29 C.F.R. § 531.32(a), reprinted at App. 93a) Further, the Administrator specifically curtailed what employers could claim as wage credits, and consequently permissible "costs" by examining who was the "primary beneficiary." (See, 29 C.F.R. §§ 531.3(d); 531.32(c), reprinted at App. 92a and 94a). Where the employer is the primary benefactor, the Administrator concludes that the cost cannot permissibly be borne by the employee.

Finally, in an effort to stem evasion of the FLSA by employers who might be inclined to recoup some or all of the federally protected minimum wage, the Administrator adopted regulations requiring the employer to pay employees "free and clear" and "unconditionally" (29 C.F.R. § 531.35). Taken as a whole, these regulations and interpretive letters provide a comprehensive and rational basis for determining the enforceability of training cost

reimbursement agreements. Yet the decision below disregards this approach and instead simply affirms an employer's unfettered right to recover training costs.

I. THE COURT SHOULD CLARIFY THAT TRAINING REIMBURSEMENT AGREEMENTS ARE VOID WHERE THEY DEPRIVE THE EMPLOYEE OF THE FEDERAL WAGE PROTECTIONS

This Court has never been called upon to decide whether or not training reimbursement agreements are enforceable. However, as our national economy falters, employers everywhere are seeking methods of lowering their costs of business. Public employers, like the City of Oakland, are no exception. Indeed, in some municipalities, police training reimbursement obligations are now imposed as a matter of code and carry a reimbursement demand in excess of $50,000.[6]

The rub against the FLSA created by training reimbursement agreements is that under the FLSA, each work week stands alone. (29 U.S.C. 206; 29 C.F.R. 778.104, reprinted at App. 96a). Pragmatically, this means that reimbursement obligations incurred at the

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[6] See for example the City of Los Angeles Administrative Code, Section 4.1700 imposes a five year minimum service commitment and requires officers to sign a reimbursement agreement obligating them to pay up to $60,000 for that city's academy expenses. Admin Code found at http://www.amlegal.com/nxt/gateway.dll?f=templates&fn_default.htm&vid=amlegal:laac_ca while a copy of that city's reimbursement agreement can be found at http://forwardthinkers-drthompson.com/adj3/lapd_trng_reimburse.pdf

time an employee terminates his or her employment, cannot invade into either the minimum wage or the contractual overtime rate of pay protected by the FLSA.

Like the City has argued to the courts below, employers are likely to assert that over the term of the employee's service, the employee has earned more than required by the FLSA, and consequently, the FLSA is not violated. This is error for the reasons discussed above. Further, whether the employee's final paycheck is withheld, or the employee is sued and must pay for the training costs from other sources, his or her effective minimum wage earned in the final work week of employment is reduced.

In 1972, the Fifth Circuit was called upon to resolve the enforceability of an ostensibly "voluntary" repayment agreement whereby employees reimbursed their employer for shortages occurring during their shift. There, the court held:

> With the employee's financial picture burdened with the 'valid debt' of the shortages, he is making less for his services than the wage that is paid to him. Whether he pays the 'valid debt' out of his wages or other sources, his effective rate of pay is reduced by the amount of such debts. When it is reduced below the required minimum wage, the law is violated. *Mayhue's Super Liquor Stores v. Hodgson,* 464 F.2d 1196, 1999 (1972).

Further, training is a cost that primarily benefits the employer. In this matter, the City was under a statutory obligation to deploy as sworn peace officers only those persons who had received police academy training that was certified by the California Commission on Peace Officer Training. The City chose to meet this obligation by establishing its own police academy and sending trainees, like the petitioner, to this in-house training facility. Like the petitioner herein, employees will follow the training dictates of their employers and will learn what their employer's teach in order to carry out the wishes of the employer. In so doing, the employer is the direct beneficiary of the training process by improving productivity. (See, 29 C.F.R. § 531.3(d)(1)). Indeed, training is tantamount to "tools of the trade and other materials and services incidental to carrying on the employer's business," a recognized cost of the employer under 29 C.F.R. § 531.3(d)(2). (App. 92a)

In applying these regulations, the Administrator has successfully invalidated training reimbursement agreements in district courts in instances where the employee is deprived of FLSA wage protections in the final work week in which the employer enforces the repayment obligation. (See for example: *Chao v. Bauerly, LLC.* 2005 WL 1923716 (D. Minn. 2005), holding unenforceable a training cost reimbursement agreement for truck drivers where the employer sought to recover $750 for initial driver training where the employee failed to work one year for the employer and the employer withheld the driver's final paycheck in partial satisfaction).

In this matter, the petitioner worked forty hours in his final work week ending February 19, 1999. (App. 88a-89a) At that time, the federal minimum wage was $5.15. The petitioner was entitled to be paid $206 and to leave with this amount as a minimum compensation for his service in that week. Unfortunately, pursuant to the MOU and the Conditional Offer, the City withheld the petitioner's entire final paycheck in partial satisfaction of its claim to recover training costs. It withheld a second check issued two months later. (App. 90a-91a) It subsequently sued the petitioner. Unlike the district court in *Chao*, the California Court of Appeal differentiated between enforceability of the reimbursement agreement, which it upheld under *Heder*, and the fact that the City withheld the final paychecks of the petitioner which the court concluded could expose the employer to liability. This nonsensical approach parses an analysis under the FLSA into enforceability of the reimbursement agreement and liability for withholding final paychecks. This evades the protections of FLSA by permitting an employer to recoup costs not otherwise permissible simply by having the employee pay back the employer from sources other than a withheld paycheck.

In *Arriaga v. Florida Pacific Farms, LLC.*, 305 F.3d 1228, (11th Cir. 2002) the Eleventh Circuit implicitly rejected such an approach saying:

> [T]here is no legal difference between deducting a cost directly from the worker's wages and shifting a cost, which they could not deduct, for the employee to

> bear. An employer may not deduct from employee wages the cost of facilities which primarily benefit the employer if such deductions drive wages below the minimum wage. See 29 C.F.R. § 531.36(b). This rule cannot be avoided by simply requiring employees to make such purchases on their own, either in advance of or during the employment. See id. § 531.35." *Id.* Pg 1236.

In *Arriaga*, Florida fruit growers had required Mexican farm workers to execute an employment agreement under which they were to advance the costs of their H-2A visas, a $6 entry fee charged at the border, and transportation costs from Monterrey, Mexico to their work sites in Florida. These costs total approximately $275. At the conclusion of fifty percent of the employment contract with the employee, the grower would reimburse the employee $120 of the costs that permitted the employee to work for the growers. At the conclusion of the contract, and only for those employees still remaining in employment with the growers, the employee would receive a bus ticket back to Loredo, Texas and twenty dollars for the remaining bus trip to Monterrey, Mexico. The employees brought suit alleging that they were deprived of the right to a minimum wage in the first week of employment because they had not been reimbursed for the costs that they advanced.

The Eleventh Circuit, relying on 29 C.F.R. §531.35 agreed. The court acknowledged that 29 C.F.R. §776.4 requires a court to look to see if there is a FLSA violation in any work week, not over the tenure of employment, *Id.*, pg 1237.[7]

II. THE DECISION DEPARTS FROM A WELL ESTABLISHED, UNIFORM, NATIONAL POLICY OF THE DEPARTMENT OF LABOR

As has been observed by this Court, "[A]n agency is entitled to deference when it adopts a reasonable interpretation of its regulations, unless its position is 'plainly erroneous or inconsistent with the regulation,'" *Auer v. Robbins*, 519 U.S. 152, 461 (1997). As observed by the Ninth Circuit, "[T]he Secretary of Labor's interpretation of her own regulations is entitled to deference and is controlling unless "plainly erroneous or inconsistent with the regulation." *Webster v. Public School Employees of Washington*, Inc., 247 F.3d 910, 914 (9th Cir. 2001) ("We must give deference to DOL's

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[7] The California Court of Appeal mistook petitioner's oral argument to suggest that *Arriaga* required the court to examine the petitioner's pay during his course of attending the police academy at the beginning of his employment in order to determine if an FLSA violation had transpired. This was not the case. The petitioner had actually attempted to articulate *Arriaga* stood for the proposition that costs benefitting the employer could simply never reduce the federal wage in any week, be that at the beginning, middle or end of the employment relationship. Where the reimbursement obligation accrues in the final work week, the petitioner would stipulate that this week is the operative examination period for any FLSA violation.

regulations interpreting the FLSA.")." *Bothell v. Phase Metrics, Inc.* 299 F.3d 1120, 1129 (9th Cir. 2002)

The Administrator has shed light on and essentially resolved the question as to enforceability of training reimbursement agreements in a series of opinion letters applying the relevant regulations.

On September 3, 1999, the Administrator responded to the following request for an opinion as to the enforceability of training reimbursement agreements. It began:

> This is in response to your letter requesting the Department's position on the application of the Fair Labor Standards Act (FLSA) to required reimbursements for internal training costs. You specifically ask if it is permissible for an employer to establish a repayment plan for employee internal training costs which would require an employee who leaves employment within an agreed-upon time period after receiving training to reimburse the employer for such training. The repayment plan would include an agreed upon value of the internal training and would be signed by the employee prior to receiving the training. (App. 68a)

After setting forth the applicable regulation (29 C.F.R. § 531.35), the Administrator responded:

> [T]he return to the employer of compensation due an employee under the FLSA would violate the statute. It is our opinion that, where a repayment plan would result in an employee receiving less than the wages required by the FLSA, it would violate the provisions of the FLSA. (App. 69a)

This opinion is the second in a series of four addressing the issue. The first, Op. Ltr., October 21, 1992, (1992 WL 845111), fully reprinted at App. 65a-67a, simply declared in pertinent part:

> The wage requirements of the FLSA will not be met where the employee "kicks-back directly or indirectly to the employer . . .the whole or part of the wage delivered to the employee.

On September 30, 1999, the Administrator issued Op. Ltr. (1999 WL 1788162), fully reprinted at App. 71a-74a. It observed and concluded in part:

> The United States Supreme Court has held that an employee may not waive his or her rights to compensation due under the FLSA. *Brooklyn Savings Bank v. O'Neil*, 328 U.S. 697 (1945). Similarly, in *Barrentine v. Arkansas-Best Freight System*, 450 U.S. 728 (1981), the Supreme

> Court held that a labor organization may not negotiate a provision that waives employees' statutory rights under the FLSA. Consequently, the return to the employer of compensation due an employee under the FLSA would violate the statute.

This series of opinion letters concluded with Op. Ltr. May 31, 2005, (2005 WL 2086807), fully reprinted at App. 75a-79a. It stated in part:

> It is thus our opinion that any reimbursement paid by the officer that will result in payment of less than the amount required by the applicable minimum wage and/or overtime requirements will violate the "free and clear" provisions of the FLSA.

Albeit two of these opinion letters addressed the recovery of wages paid trainees if they left before a specified date, two letters addressed the recovery of training costs incurred by the employer in training the employee. All letters concluded that such agreements were impermissible where the reimbursement deprived the employee of the federally protected wage rights. Unfortunately, the decision below departs from this sound train of logic.

In rendering its decision, the California Court of Appeal simply held that the City was not seeking to recover salary paid to the petitioner and dismissed two letters as irrelevant.

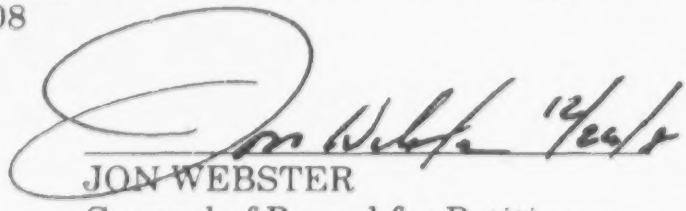
Further, the court below appears not to have specifically considered the September 3, 1999 letter, while it dismissed as "unclear" the September 30, 1999 letter.

These letters form an unbroken, uniform approach to determining if a reimbursement agreement is lawful. The wholesale abandonment by the court below of the controlling weight of these letters places in jeopardy the national approach pursued by the Department of Labor. This Court should confirm the Department's approach.

CONCLUSION

For each of the aforementioned reasons, the petitioner respectfully requests this Court grant his petition for certiorari.

Respectfully submitted this 15th day of December, 2008



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KENNEY D. HASSEY

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(2)

No. _____

IN THE
Supreme Court of the United States

KENNY D. HASSEY,

Petitioner,

v.

CITY OF OAKLAND,

Respondent.

On Petition for Writ of Certiorari to the California Court of Appeal for the First District

APPENDIX TO THE PETITION FOR WRIT OF CERTIORARI

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December 15, 2008

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December 15, 2008

TABLE OF APPENDICES

TABLE OF APPENDICES - Continued

TABLE OF APPENDICES - Continued

TABLE OF APPENDICES - Continued

APPENDIX A

CERTIFIED FOR PUBLICATION
Court of Appeal, First Appellate District

FILED
JUN 17 2008
Diana Herbert,
Clerk by_____Deputy Clerk

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA FIRST APPELLATE DISTRICT DIVISION FOUR

CITY OF OAKLAND,
Plaintiff, Cross-defendant and Respondent,

v.

KENNY D. HASSEY,
Defendant, Cross-complainant and Appellant;

RICHARD WORD,
Cross-defendant and Respondent.

A116360
(Alameda County Super. Ct. No. 2001-027607)

Respondent City of Oakland (Oakland) sued appellant Kenny D. Hassey for breach of contract after Hassey failed to reimburse the city (as agreed) for the costs of training him to become a police officer with the Oakland Police Department. Hassey filed a cross-complaint against Oakland and respondent Richard Word, the chief of the Oakland Police Department, alleging that the agreement to repay Oakland for training costs violated the Fair Labor Standards Act (29 U.S.C. §§ 201-219 (FLSA)) and various state laws. The trial court granted Oakland's motion for summary judgment on its complaint, granted respondents' motion for summary judgment on Hassey's cross-complaint, and denied Hassey's summary judgment motion on both complaints. We conclude that Hassey failed to establish that the agreement to reimburse Oakland for training costs violated the FLSA, although Oakland's withholding of Hassey's final paycheck to cover his debt did. We also agree with Hassey that the trial court erred in concluding that some of the causes of action in his cross-complaint against Oakland were barred by the statute of limitations. We therefore affirm in part and reverse in part.

I. FACTUAL AND PROCEDURAL BACKGROUND

The relevant facts are largely undisputed. Oakland owns and operates the Oakland Police Academy, which is certified by the Commission on Peace Officer Standards and Training (POST). (Cal. Code Regs., tit. 11, §1005, subd. (a)(1) [minimum standards for training of entry level peace officers].) It is city policy to send police officer trainees to its own academy, even though there are other POST-certified

academies in the state. Oakland found that it lost money when it trained officers who left its police department within a few years after receiving training. To encourage police officers to stay with the department longer, Oakland entered into a memorandum of understanding (MOU) with the Oakland Police Officers' Association in 1996 authorizing the city to require those who went through training at its academy to reimburse the city for training costs if the person left the police department before completing five years of service. The MOU also provided, "Repayment shall be due and payable at the time of separation and the City shall deduct any amounts owed under this provision from the employee's final paycheck. If said deduction does not fully reimburse the City for outstanding costs, the balance shall thereupon be due and owing."

On December 15, 1997, Hassey signed a "Conditional Offer of Position as a Police Officer Trainee" (conditional offer) with the Oakland Police Department. The conditional offer provided, consistent with the MOU, that Hassey's selection as a police officer trainee was subject to (among other things) the condition that he repay his $8,000 training expenses if he voluntarily terminated his employment with the police department before the end of five years.[1]

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[1] The MOU in effect at the time Hassey signed the conditional offer provided: "Police Office[r] Trainee Training Costs. The parties recognize that in the past a substantial number of persons have accepted the benefit of training at the Oakland Police Academy and then have voluntarily separated from service to join other safety agencies or have decided for personal reasons that police work is not their preference. The purpose of this provision is to insure that the recruit either accept a commitment of service

The $8,000 represented the expenses associated with training a police officer at the academy; the figure did not include wages paid to police officer trainees while they attended the academy. Hassey's repayment obligation was to decrease each year he remained with the police department, so that he would owe repayment of the entire $8,000 if he left after less than a year, 80 percent of the $8,000 if he left before the end of his second year, 60 percent if he left before the end of his third year, 40 percent if he left before the end of his fourth year, down to 20 percent of the $8,000 if he left before the end of his fifth year.

Oakland hired Hassey as a police officer trainee on March 16, 1998. The same day, he signed a document titled "reimbursement of training expenses" (reimbursement agreement), which contained the same repayment provision that was set forth in the conditional offer. Hassey attended the Oakland Police Academy from April to November 1998, when he graduated.[2]

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to the City or be responsible for costs associated with Academy training. Thus the parties agree that any member who, prior to completing five years of service, voluntarily separates from service with the department shall be responsible for reimbursing the City, on a full or pro[ ]rata basis, for the $8000 cost of his or her training at the Police Academy. . . ." (Fn. omitted.) Oakland and the Police Officers' Association later entered into another MOU, which contained an identical provision.

[2] Oakland acknowledged below that it was required by state law to send Hassey to a POST-certified police academy. (Pen. Code, §§ 832, subd. (a) [peace officers shall complete specified training], 13510 [adoption of minimum standards for recruitment and training].) Lateral hires who are already police officers do not go through the same training; Oakland sends them to a "mini

That same month, he was promoted to police officer and was assigned to the police department's field training program to receive additional instruction.

According to Hassey's declaration in support of his summary judgment motion, his field training officer told him in February 1999 that he was "not performing to standards and that [he] should consider resigning in lieu of termination." Hassey resigned on February 10, 1999, based on his field training officer's representation. On February 16, 1999, Hassey signed a document titled "training costs repayment agreement" (repayment agreement), which acknowledged that Hassey owed repayment of $8,000 for his training costs, to be paid in 24 monthly installments of $333.34.

Oakland withheld Hassey's final paycheck dated February 25, 1999 (for $725.28) to cover some of the money owed under the repayment agreement. A check dated April 30, 1999 (for $654.80) to cash out Hassey's retirement balance also was withheld to cover money owed under the repayment agreement. That left a balance of $6,619.92 owed by Hassey under the repayment agreement. Oakland sent a series of collection notices to Hassey; Hassey apparently did not respond.

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academy." The trial court found that "[t]he record clearly establishes that the City's reimbursement provision only applies to applicants without the basic training required of all peace officers under state law," and that Hassey was free to seek training at another POST-certified academy before applying to work for Oakland in lieu of attending the city's academy.

On October 17, 2001, Oakland filed a complaint against Hassey alleging breach of contract. Oakland sought the amount owed under the repayment agreement, plus a $100 collection fee, interest, attorney fees, and costs. Hassey's answer to the complaint included an affirmative defense that the contract was unenforceable because it violated the FLSA and various provisions of the California Labor and Business and Professions Codes (Lab. Code, §§ 221-223, 432.5, 450; Bus. & Prof. Code, §§ 16600, 17200).

On May 10, 2002, Hassey filed a cross-complaint against respondents Oakland and Word, the chief of the Oakland Police Department. Like Hassey's answer to Oakland's complaint, the cross-complaint alleged that the conditional offer that Hassey was "compelled" to sign violated the FLSA and various state laws. The cross-complaint alleged causes of action for deprivation of civil rights (42 U.S.C. § 1983); violation of the FLSA; violations of Labor Code sections 221, 223, 432.5, and 450; "unlawful contract" (Civ. Code, §§ 1667-1668); "void contract" (Bus. & Prof. Code, § 16600); and unfair competition (Bus. & Prof. Code, § 17200).[3]

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[3] Two other former Oakland police officers, Matthew DeLorenzo and Chris Baker, later "opted in" to the cross-complaint pursuant to the FLSA. The trial court granted respondents' summary judgment motion as to DeLorenzo and Baker, and denied DeLorenzo's and Baker's summary judgment motion. DeLorenzo and Baker appealed; however, their counsel informed this court that they requested to withdraw from the appeal. We therefore do not consider those portions of the trial court's orders that were directed at DeLorenzo and Baker.

Hassey and respondents filed summary judgment motions on the same day. Hassey argued that Oakland's lawsuit against him had no merit because the conditional offer and repayment agreement violated federal and state law. He sought summary judgment as a defendant on Oakland's complaint and as a cross-complainant on his cross-complaint. Oakland argued in its motion for summary judgment, among other things, that various causes of action in Hassey's cross-complaint were barred by the statute of limitations, and that requiring employees to reimburse Oakland for training costs did not violate the FLSA. Oakland also sought summary judgment on its complaint, arguing that there was no dispute that Hassey owed money under the repayment agreement.

The trial court granted respondents' motion for summary judgment. As to Oakland's complaint against Hassey, it concluded that there were no triable issues as to whether Hassey owed money under the repayment agreement, and concluded that Hassey owed Oakland $6,619.92. As to Hassey's cross-complaint, the trial court concluded that the causes of action were barred by the statute of limitations or failed for other reasons. The trial court also denied Hassey's motion for summary judgment. Hassey timely appealed the subsequent judgment.

II. DISCUSSION

On appeal, the parties disagree over whether the conditional offer, reimbursement agreement, and repayment agreement violate the FLSA and various other laws, but do not always specify to which of the trial court's two orders (or to which of the two complaints at issue) they direct their arguments. We find it helpful to address the complaint and cross-complaint separately.

A. Summary Judgment Proper on Oakland's Complaint.

1. Oakland's breach of contract cause of action.

A plaintiff is entitled to summary judgment on a contract cause of action where it establishes by competent evidence the existence of a contract, defendant's breach and damages, and defendant does not controvert such facts. (*Law Offices of Dixon R. Howell v. Valley* (2005) 129 Cal.App.4th 1076, 1092 [29 Cal.Rptr.3d 499] (*Law Offices*); see also Code Civ. Proc., § 437c, subd. (p)(1).) Our review of the granting or denial of summary judgment is de novo. (*Law Offices*, at p. 1092.) Here, the trial court granted summary judgment on Oakland's complaint for breach of contract, ruling that Hassey owed $6,619.92 on the agreements he signed with Oakland to repay his training costs. We concur with this finding. (*Ibid.*) Indeed, Hassey admitted in his separate statement in response to Oakland's statement of undisputed facts (Code Civ. Proc., § 437c, subd. (b)(3)) that he signed the

conditional offer, reimbursement agreement, and repayment agreement. Although he disputed whether he was legally obligated to repay his training costs, he did not otherwise dispute the accuracy of the amount that was due under the repayment agreement. "Thus, putting aside any affirmative defenses (discussed below), [Oakland] was entitled to summary judgment." (*Law Offices*, at p. 1092.)

Hassey argued in his summary judgment motion as to Oakland's complaint against him that the conditional offer and reimbursement agreement were void and violated the FLSA and various other federal and state laws. The trial court rejected Hassey's arguments and denied his motion for summary judgment. "While an order denying summary judgment is not directly appealable, it is reviewable after entry of judgment." (*Law Offices*, *supra*, 129 Cal.App.4th at p. 1091.)

We first note that although the trial court's orders do not make this point, there are actually two distinct inquiries here. The first is whether the conditional offer, reimbursement agreement, or repayment agreement violate the FLSA (or other federal and state laws); the second is whether withholding Hassey's checks violated those same laws.

2. Reimbursement agreement valid.

As to the first inquiry, we conclude that Hassey failed to establish that the conditional offer, reimbursement agreement, and repayment agreement were unlawful. He first argues on appeal, as he did below, that the reimbursement agreement violates the FLSA. He notes that the FLSA mandates that Oakland pay its employees at least the minimum wage (29 U.S.C. § 206), that it pay them overtime (29 U.S.C. § 207(a)(1)), and that for this purpose, each workweek stands alone (29 C.F.R. § 778.104 (2007)). In other words, an employee who works 30 hours during one week but 50 hours the next must be paid overtime compensation for the overtime hours worked during the second week, even though the "average" number of hours worked over two weeks is 40. (29 C.F.R. § 778.104 (2007).) Hassey argues that Oakland violated these minimum wage and overtime mandates because even though it paid him "well above" the minimum wage during his tenure with the police department, he did not receive his wages "unconditionally" or " 'free and clear,' " as required by federal regulations. (29 C.F.R. § 531.35 (2007).) He claims that while he was working under the reimbursement agreement, he was being paid under the " 'condition' " that he repay his training costs should he leave before the end of five years.

The trial court rejected this argument, relying primarily on *Heder v. City of Two Rivers, Wisconsin* (7th Cir. 2002) 295 F.3d 777 (*Heder*), which we find persuasive. *Heder* involved a reimbursement agreement similar to the one at issue here. A city

provided firefighters with paramedic training, with the understanding that firefighters who left within three years of receiving the training would reimburse the city for training costs. (*Id.* at p. 778.) A firefighter quit less than two years after beginning his training, and the city withheld all of his pay from his last two pay periods. (*Ibid.*) The firefighter sued, and the city filed a counte rclaim for the remainder of the money it claimed the firefighter owed. (*Ibid.*)

Heder rejected the firefighter's argument that the repayment agreement violated a Wisconsin statute prohibiting covenants not to compete, concluding that the agreement did not restrict the firefighter's ability to compete against the city after leaving its employ. (*Heder*, *supra*, 295 F.3d at p. 780.) The court noted that even though the city's repayment obligation made it more costly to change jobs, that was not enough to invalidate the agreement. (*Ibid.*) The court likened the repayment agreement to other valid incentives that employers offer their workers to stay with them. (*Id.* at pp. 780-781.) The court also noted that residents of the city where the firefighters worked received the benefit of a more skilled fire department, and that the city might be less likely to provide that benefit if it feared that employees would leave the fire department, taking their new skills elsewhere. (*Id.* at p. 781.) Likewise here, Oakland was permitted to seek reimbursement from police officers who gained the benefit of its training program at the Oakland Police Academy but did not stay with the police department long enough for Oakland to benefit from that training.

Hassey directs us to no contrary authority in his appellate briefs. He relies primarily on three opinion letters from the Wage and Hour Division of the United States Department of Labor. Two of the opinion letters are easily distinguishable, because they addressed whether employers were permitted under the FLSA to seek reimbursement for an employee's *salary* paid while receiving training, as opposed to the cost of the training itself. (Dept. Lab. Opn. Letter (May 31, 2005) 2005 WL 2086807; Dept. Lab. Opn. Letter (Oct. 21, 1992) 1992 WL 845111.) As to the third letter, issued in 1999, we agree with the trial court that it is unclear whether the opinion addressed reimbursement of training costs, as opposed to salary paid during training. (Dept. Lab. Opn. Letter (Sept. 30, 1999) 1999 WL 1788162.) In any event, we note that the subsequent 2005 opinion letter relied on by Hassey cites with approval *Heder*, *supra*, 295 F.3d 777 (albeit for a different point), an indication that the Department of Labor would not disapprove of the type of reimbursement agreement at issue there.[4] (2005 WL 2086807.)

Hassey does not address (or even cite) *Heder* in his opening brief. He argues in his reply brief that the decision analyzed Wisconsin law and did not address whether the reimbursement agreement violated the FLSA's "anti-kickback provision (29 C.F.R. § 531.35)." For the first time in this litigation, Hassey argued at oral argument in this court that the reimbursement agreement violates the FLSA because his training was

[4] We reject out of hand Hassey's argument that Oakland's breach of contract cause of action is "preempted" by the FLSA, as he identifies no law subject to "preemption."

provided primarily for the benefit of his employer, which brought it into the definition of "wages" under the statute.[5] (29 U.S.C. § 203(m); 29 C.F.R. § 531.3(d)(1) (2007).) The FLSA defines wages to include the reasonable cost to an employer of furnishing an employee with "board, lodging, or other facilities, if such board, lodging, or other facilities are customarily furnished by such employer to his employees." (29 U.S.C. § 203(m); *Arriaga v. Florida Pacific Farms, L.L.C.* (11th Cir. 2002) 305 F.3d 1228, 1235.) This means that when an employer pays for "board, lodging, or other facilities," it may add the costs of those items to an employee's cash wage for purposes of complying with the minimum set forth in the FLSA. Department

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[5] This court sent notice to the parties on March 19, 2008, scheduling oral argument. After one continuance, oral argument was eventually set for May 13. On May 8, less than a week before oral argument and more that seven weeks after this court sent oral argument notice, Hassey notified this court that he planned to rely at argument on *Rivera v. Brickman Group, LTD.* (E.D.Pa., Jan. 7, 2008, No. 05-1518) 2008 WL 81570, which was decided after briefing was completed in this case but more than two months before the parties received notice of oral argument. On May 7, 2008 (again, less than a week before oral argument), Hassey filed a request for judicial notice of a Wisconsin statute and excerpts from an enforcement manual issued by California's Division of Labor Standards Enforcement. "An appellate court may properly decline to take judicial notice under Evidence Code sections 452 and 459 of a matter which should have been presented to the trial court for its consideration in the first instance." (*Brosterhous v. State Bar* (1995) 12 Cal.4th 315, 325-326 [48 Cal.Rptr.2d 87, 906 P.2d 1242] ; see also *People v. Preslie* (1977) 70 Cal.App.3d 486, 494 [138 Cal.Rptr. 828] ["desirable in the interest of orderly judicial procedure that [request for judicial notice] be made *well before*" briefing stage], italics added.) The Wisconsin statute and enforcement manual are such matters, and we denied Hassey's request on May 19.

of Labor regulations state that an employer may not count as "other facilities" things that are "primarily for the benefit or convenience of the employer," such as tools of the trade or uniforms. (29 C.F.R. § 531.3 (d)(1)-(2) (2007).) Employers likewise may not pass along to employees the costs of such facilities if to do so would cut into an employee's minimum wage. (29 C.F.R. § 531.35 (2007).) In other words, if an employer passes along such an expense to the employee, the expense is deducted from the cash wage to determine compliance with the FLSA minimum. (*Arriaga v. Florida Pacific Farms, L.L.C., supra*, 305 F.3d at p. 1236.)

Not surprisingly, the parties disagreed at oral argument whether Hassey's training was "primarily for the benefit" of Oakland. It appears, however, that this is the first time in this litigation that they advanced their respective arguments with respect to the cited United States Code and Code of Federal Regulations provisions, as they did not brief this issue in the trial court or in this court. The trial court's order certainly did not analyze whether providing Hassey's training was primarily for the benefit of Oakland, or cite title 29 United States Code section 203(m) or 29 Code of Federal Regulations part 531.3(d) (2007).

Even assuming arguendo that providing training to Hassey was primarily for the benefit of Oakland, and that Oakland therefore could not deduct the cost of the training from Hassey's wages *if to do so would drive wages below the minimum wage*, Hassey has not established a violation of the FLSA here. As Hassey's counsel argued at oral argument, "[w]orkers must be reimbursed during the first workweek for pre-

employment expenses which primarily benefit the employer, to the point that wages are at least equivalent to the minimum wage." (*Arriaga v. Florida Pacific Farms, L.L.C.*, *supra*, 305 F.3d at p. 1237.) Here, however, Hassey received training *while he was an employee* of Oakland and was receiving wages; he thus incurred no "pre-employment expenses."

To the extent that an employer must reimburse an employee for expenses during employment that drive wages below minimum wage, "[i]f an expense is determined to be primarily for the benefit of the employer, the employer must reimburse the employee during the workweek in which the expense arose." (*Arriaga v. Florida Pacific Farms, L.L.C.*, *supra*, 305 F.3d at p. 1237.) The reimbursement agreement stated that the cost to train Hassey was $8,000. Hassey's final paycheck shows that he earned $23.39 per hour during the final pay period when he was employed for Oakland; Hassey acknowledged in briefing before the trial court that there was no evidence of how much he made during his training. Even assuming that Oakland had deducted the cost of training as he received it, it is unclear that such a hypothetical deduction would have driven Hassey's salary below the minimum wage. Hassey emphasized at oral argument that each workweek stands alone (29 C.F.R. § 778.104 (2007)), presumably meaning that Oakland was not permitted to deduct the entire $8,000 cost of training from a single paycheck. While we certainly agree with *that* proposition (*post*, § II.A.3.), there is no evidence that deducting training costs from Hassey's paycheck as they were incurred would have reduced his wages below minimum wage.

The California statutes upon which Hassey relies likewise do not support his position. Three of the Labor Code provisions he cites address proper payment of wages, an issue not contemplated by the agreement to repay Oakland for training expenses. (Lab. Code, §§ 221 ["It shall be unlawful for any employer to collect or receive from an employee any part of wages theretofore paid by said employer to said employee."], 222 [unlawful in case of wage agreement arrived at through collective bargaining "either willfully or unlawfully or with intent to defraud an employee . . . to withhold from said employee any part of the wage agreed upon"], 223 ["it shall be unlawful to secretly pay a lower wage while purporting to pay the wage designated by statue or by contract"].) Labor Code section 432.5, upon which Hassey also relies, prohibits employers from requiring employees or prospective employees "to agree, in writing, to any term or condition which is known by such employer . . . to be prohibited by law." Again, we conclude that there was nothing unlawful about requiring Hassey to repay his training costs if he left the police department before five years.[6] For this same reason, we conclude that Civil Code sections 1667 and 1668,[7] and Business and

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[6] We likewise reject Hassey's argument that requiring him to repay his training costs violates Labor Code section 450, which prohibits employers from coercing employees to patronize an employer or to purchase anything of value. As the trial court found, Hassey was free to seek employment with another law enforcement agency or obtain training at another academy before applying to work with the Oakland Police Department. (See *post*, § II.B.6.)

[7] Civil Code section 1667 defines unlawfulness as that which is "1. Contrary to an express provision of law; [¶] 2. Contrary to the

Professions Code section 17200,[8] also relied on by Hassey, are inapplicable.

To the extent that Hassey argues that his agreement to repay Oakland was an impermissible covenant not to compete in violation of Business and Professions Code section 16600,[9] we note that an identical argument with respect to a Wisconsin anti-competition statute was specifically rejected in *Heder*. (*Heder*, *supra*, 295 F.3d at p. 780 [reimbursement agreement did not restrict employee's ability to compete with city after leaving its employ].) We recognize that in California, "the general rule is that covenants not to compete are void" (*Kelton v. Stravinski* (2006) 138 Cal.App.4th 941, 946 [41 Cal.Rptr.3d 877]), whereas under the Wisconsin law analyzed in *Heder*, restrictive covenants in employment contracts are permitted if they are "reasonably necessary for the protection of the employer or principal." (Wis. Stat. § 103.465; cf. *Application Group, Inc. v. Hunter Group, Inc.* (1998) 61

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policy of express law, though not expressly prohibited; or, [¶] 3. Otherwise contrary to good morals." Civil Code section 1668 provides, "All contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud, or willful injury to the person or property of another, or violation of law, whether willful or negligent, are against the policy of the law."

[8] Business and Professions Code section 17200 defines "unfair competition" as "any unlawful, unfair or fraudulent business act or practice [or] unfair, deceptive, untrue or misleading advertising . . ."

[9] Business and Professions Code section 16600 provides, "Except as provided in this chapter, every contract by which anyone is restrained from engaging in a lawful profession, trade, or business of any kind is to that extent void."

Cal.App.4th 881, 900 [72 Cal.Rptr.2d 73] [Bus. & Prof. Code, § 16600 " 'has specifically been held to invalidate employment contracts which prohibit an employee from working for a competitor when the employment has terminated, unless necessary to protect the employer's trade secrets. [Citation.]' "].) The fact remains, however, that nothing in the agreements Hassey signed "restrained [him] from engaging in [his] lawful trade, business or profession." (*Kolani v. Gluska* (1998) 64 Cal.App.4th 402, 407 [75 Cal.Rptr.2d 257] [analyzing Bus. & Prof. Code, § 16600].) Nothing prevented him from working for another police department, or anywhere else, for that matter.

3. Oakland improperly withheld Hassey's final paycheck.

Although we have concluded that Oakland was permitted to seek reimbursement for training expenses, the question remains whether it was permitted to withhold Hassey's final paycheck in order satisfy Hassey's debt. We conclude that Oakland was not permitted to do so. As Hassey correctly notes, the FLSA mandates that employers such as Oakland pay their employees at least the statutory federal minimum wage. (29 U.S.C. § 206(a)(1); *Heder*, *supra*, 295 F.3d at p. 779.) An employee is "entitled to keep any compensation that the FLSA specifies as a statutory floor below which no contract may go." (*Heder*, at p. 779.) That means, quite simply, that Hassey was entitled to at least the statutory minimum wage for the

final pay period he worked.[10] (*Ibid.*; see also 29 C.F.R. § 531.35 (2007) [wage requirements of FLSA will not be met where employee " 'kicks-back' " whole or part of the wage delivered to the employee].) *Heder* recognized this principle when it held that although the city was permitted to seek reimbursement of training costs from a firefighter, it had to pay that firefighter his or her wages and then seek to collect any residue as an ordinary creditor. (*Heder*, at p. 779;[11] see also *Calderon v. Witvoet* (7th Cir. 1993) 999 F.2d 1101, 1107 [employer may not reduce wage below statutory minimum to collect a debt to the employer]; *Brennan v.*

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[10] This is consistent with a recent order granting Oakland's motion to dismiss (Fed. Rules Civ. Proc., rule 12(b)(6), 28 U.S.C.) a separate lawsuit in federal court involving the same reimbursement agreement at issue here. (*Gordon v. City of Oakland* (N.D.Cal. May 16, 2008, No. C08-01543 WHA) 2008 WL 2095510.) Respondents filed a request for judicial notice of the order, which we hereby grant. (Evid. Code, §§ 452, subd. (d), 459, subd. (a).) In *Gordon*, the plaintiff alleged that the withholding of *a portion* of her final paycheck violated the FLSA. The court rejected this argument, noting that the plaintiff still earned "well above the minimum wage established by FLSA" for her final pay period. Here, by contrast, it is undisputed that Oakland withheld Hassey's entire final paycheck, which, as he notes in his opening brief, left him with "a zero income" for the pay period covered by the check.

[11] Oakland points to language in *Heder* that employees may strike agreements with their employers to be paid less than " 'in full' " as required by Wisconsin law and claims that this authorized the city to withhold Hassey's entire final paycheck. (*Heder*, *supra*, 295 F.3d at p. 783.) Although *Heder* recognized that an employer may withhold *some* amount from a final paycheck by agreement, it specifically held that the amount withheld could not reduce an employee's paycheck so that he was being paid less than the federally mandated minimum wage. (*Id.* at pp. 782-783.)

Veterans Cleaning Service, Inc. (5th Cir. 1973) 482 F.2d 1362, 1369-1370 [same].)

This conclusion is consistent with the rule in California that "an employer is not entitled to a setoff of debts owing it by an employee against any wages due that employee." (*Barnhill v. Robert Saunders & Co.* (1981) 125 Cal.App.3d 1, 6 [177 Cal.Rptr. 803] (*Barnhill*) [employer not permitted to deduct from final paycheck balance due on a promissory note].) Such collection of a debt violates the absolute exemption that wages have from levies of attachment. (*Ibid.*, citing Code Civ. Proc., § 487.020, subd. (c); see also *California State Employees' Assn. v. State of California* (1988) 198 Cal.App.3d 374, 377 [243 Cal.Rptr. 602] [attachment and wage garnishment laws "provide substantial protection for wages against both pretrial attachments and enforcement of judgments"].) As the court explained in *Barnhill*, "fundamental due process considerations underlie the prejudgment exemption. Permitting [an employer] to reach [an employee's] wages by setoff would let it accomplish what neither it nor any other creditor could do by attachment and would defeat the legislative policy underlying that exemption." (*Barnhill*, *supra*, 125 Cal.App.3d at p. 6.) "Wages of workers in California have long been accorded a special status generally beyond the reach of claims by creditors including those of an employer." (*Kerr's Catering Service v. Department of Industrial Relations* (1962) 57 Cal.2d 319, 325 [19 Cal.Rptr. 492, 369 P.2d 20] (*Kerr's Catering*); see also *Hudgins v. Neiman Marcus Group, Inc.* (1995) 34 Cal.App.4th 1109, 1112 [41 Cal.Rptr.2d 46] [employers not entitled to setoff of debts owed by employees against wages due

to employees upon termination].)

Under the FLSA, the prohibition against withholding money due under a debt to an employer applies whether or not the employee agreed in writing to the withholding. (*Brennan v. Veterans Cleaning Service, Inc.*, *supra*, 482 F.2d at p. 1370, citing *Brooklyn Bank v. O'Neil* (1945) 324 U.S. 697 [impermissible to waive by agreement statutory protections of FLSA]; *Mayhue's Super Liquor Stores, Inc. v. Hodgson* (5th Cir. 1972) 464 F.2d 1196, 1197, 1199 [employee's agreement to repay employer shortages in money entrusted to him violates FLSA to the extent it reduces pay below minimum wage and is invalid].) "The voluntariness of an assignment of wages to the employer is inherently suspect. When the employer is the creditor, payment may not be made by paycheck deductions which reduce net pay below minimum wage, even where the employee apparently consents to such an arrangement." (*Brennan*, *supra*, at p. 1370.) The only evidence that Hassey "consented" to the withholding of any check was the provision in the MOU authorizing deductions from final paychecks to cover reimbursement for training costs. The conditional offer, reimbursement agreement, and repayment agreement signed by Hassey stated that he was obligated to repay training expenses if he left the police department before the end of five years, but they did not refer to deductions from his paycheck. In fact, the repayment agreement he signed when he left the police department stated, "The total amount owed to the City of Oakland is $8,000, minus the amount of my final paycheck *in the amount of $0*, leaving a balance of $8,000.00." (Italics added.) In short, we disagree

with the trial court's conclusion that Hassey made no showing that Oakland effectively paid him less than minimum wage, at least with respect to the pay period covered by his final paycheck.

Although we have concluded that Oakland was not permitted to withhold Hassey's final paycheck, it does not follow that the trial court erred in denying Hassey's motion for summary judgment on Oakland's complaint. It is true, as Hassey argues, that courts permit defendants to raise defenses that would be barred if raised as affirmative relief. (*Styne v. Stevens* (2001) 26 Cal.4th 42, 47, 51 [109 Cal.Rptr.2d 14, 26 P.3d 343].) "The rule applies in particular to contract actions. One sued *on a contract* may urge defenses that render the contract unenforceable, even if the same matters, alleged as grounds for restitution after rescission, would be untimely." (*Id.* at pp. 51-52, italics added.) Here, Oakland sued on the repayment agreement, in which Hassey agreed he would reimburse Oakland for training costs, an agreement we already have concluded was valid. Whether Hassey could seek affirmative relief for Oakland's withholding his check to collect on its otherwise valid agreement with Hassey is a separate inquiry, which we address below.

B. Triable Issues As to Some Causes of Action in Cross-Complaint.

The trial court granted summary judgment as to Hassey's entire cross-complaint against respondents. We review the trial court's decision granting summary judgment de novo. (*Yanowitz v. L'Oreal USA, Inc.*

(2005) 36 Cal.4th 1028, 1037.) We separately address the nine causes of action in the cross-complaint.

1. Summary adjudication proper as to first cause of action.

The first cause of action in Hassey's cross-complaint alleged that the conditional offer, as well as the seizure of his final check, deprived him of his civil rights, in violation of title 42 United States Code section 1983.[12] In their motion for summary judgment, respondents argued that this cause of action was barred by the one-year statute of limitations set forth in former Code of Civil Procedure section 340, subdivision (3). (*McDougal v. County of Imperial* (9th Cir. 1991) 942 F.2d 668, 673 [statute of limitations in § 1983 actions filed in California is governed by limitations period that applies to personal injury actions (former Code Civ. Proc., § 340 subd. (3))].)[13]

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[12] Title 42 United States code section 1983 provides in part, "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . , subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . ."

[13] On January 1, 2003, the statute of limitations period for personal injury actions was expanded to two years following the Legislature's enactment of Code of Civil Procedure section 335.1, which governs actions "for assault, battery, or injury to, or for the death of, an individual caused by the wrongful act or neglect of another." (*Krupnick v. Duke Energy Morro Bay* (2004) 115 Cal.App.4th 1026, 1028 [9 Cal.Rptr.3d 767].) The expanded limitations period does not apply to claims that were already time-

In its order granting respondents' motion for summary judgment, the trial court stated that "all of the Causes of Action in the Complaint and the Cross-Complaint are disposed of on the grounds set forth herein." The trial court did not specifically address Hassey's first cause of action; however, the quote above clearly indicates that the court intended to grant summary judgment as to the first cause of action.

On appeal, neither side raises the trial court's failure to address Hassey's civil rights claim. Respondents renew their argument that the claim is barred by the statute of limitations, and we agree. The failure of the trial court to state reasons for granting summary judgment as to this cause of action (Code Civ. Proc., § 437c, subd. (g)) was harmless " 'since " '[i]t is the validity of the ruling which is reviewable and not the reasons therefore.' " ' [Citation.]" (*Byars v. SCME Mortgage Bankers, Inc.* (2003) 109 Cal.App.4th 1134, 1146 [135 Cal.Rptr.2d 796] [trial court's failure to address cause of action on summary judgment was harmless error where appellant failed to present evidence to raise a triable issue of fact].) This is especially true in light of the fact that although Hassey argued in his opening brief that he had a valid claim under title 42 United States Code section 1983, he dropped this argument in his reply brief.

2. Trial court erred in granting summary adjudication on FLSA cause of action as to Oakland, but not Word.

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barred when the new law went into effect, which was the case here. (*Id.* at pp. 1028, 1030.)

Hassey's second cause of action in his cross-complaint was for violations of the FLSA; he alleged that the withholding of money owed to him violated the FLSA.[14] As we already have concluded, this contention has merit.[15] (*Ante*, § II.A.) Summary adjudication was therefore inappropriate as to this cause of action, assuming that it was timely. The trial court concluded, however, that Hassey's FLSA cause of action was barred by the two-year limitations period set forth in title 29 United States Code section 255(a),[16] because Hassey's May 10, 2002, cross-complaint was filed more than two years after Oakland's allegedly unauthorized deductions in February and April 1999. In reaching this conclusion, the trial court erroneously (at least with respect to Oakland) used the date of the filing of Hassey's *cross-complaint* to determine whether the

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[14] The complaint did not distinguish between the withholding of Hassey's final paycheck and the withholding of the cash-out of his retirement. The parties likewise do not offer any legal argument on appeal as to whether there is a distinction between the withholding of retirement money (as opposed to wages), but they are free to do so on remand. We reach no conclusion as to whether the withholding of the retirement cash-out check violated any laws or regulations.

[15] We disagree with the allegations in Hassey's cross-complaint that his original agreement to reimburse Oakland for training costs violated the FLSA, for the reasons set forth above. (*Ante*, § II.A.)

[16] Title 29 United States Code section 255(a) provides that any action for unpaid minimum wages "may be commenced within two years after the cause of action accrued, and every such action shall be forever barred unless commenced within two years after the cause of action accrued, except that a cause of action arising out of a willful violation may be commenced within three years after the cause of action accrued." Hassey therefore actually had up to three years to file an FLSA cause of action, depending on factors we discuss below.

statute of limitations had run. However, it is well settled that the statute of limitations " 'is a bar to the defendant's affirmative claim only if the period has already run when *the complaint is filed*. The filing of the complaint suspends the statute during the pendency of the action, and the defendant may set up his [or her] claim by appropriate pleading at any time.' "[17] (*Luna Records Corp., Inc., v. Alvarado* (1991) 232 Cal.App.3d 1023, 1026 [283 Cal.Rptr. 865], italics added; see also *Trindade v. Superior Court* (1973) 29 Cal.App.3d 857, 860 [106 Cal.Rptr. 48] ["It has consistently been held that the commencement of an action tolls the statute of limitations as to a defendant's then unbarred cause of action against the plaintiff."].) Hassey's cross-complaint was therefore timely if his FLSA cause of action was not time-barred

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[17] Hassey raised this issue below in his opposition to respondents' summary judgment motion, as well as at the hearing on the motion. Inexplicably, Hassey does not address in his opening brief the trial court's conclusion regarding the statute of limitations as to any cause of action, instead waiting until his reply brief to address the is sue. We recognize that we therefore have the discretion to deem the issue waived, as respondents urge. (*Tiernan v. Trustees of Cal. State University & Colleges* (1982) 33 Cal.3d 211, 216, fn. 4 [188 Cal.Rptr. 115, 655 P.2d 317]; *Campos v. Anderson* (1997) 57 Cal.App.4th 784, 794, fn. 3 [67 Cal.Rptr.2d 350]; *Locke v. Warner Bros., Inc.* (1997) 57 Cal.App.4th 354, 368 [66 Cal.Rptr.2d 921] [points raised in reply brief for first time will not be considered absent good cause].) We decline to do so, in light of our de novo review and the trial court's error as to some causes of action (with respect to respondent Oakland). "[B]ecause the court may decide a case on any proper points or theories, whether urged by counsel or not, there is no reason why it cannot examine the record, do its own research on the law, or accept a belated presentation." (9 Witkin, Cal. Procedure (4th ed. 1997) Appeal, § 595, p. 629.)

when Oakland filed its original complaint on October 17, 2001.

The filing of Oakland's complaint against Hassey did not toll the statute of limitations with respect to respondent Word, however.[18] " 'The principle underlying the rule that a statute of limitations is suspended by the filing of the original complaint is that the plaintiff has thereby waived the claim and permitted the defendant to make all proper defenses to the cause of action pleaded. But, where the controversy is limited to cross-defendants, none of whom has done any act in the nature of a waiver the reason for the rule does not exist.' " (*Boyer v. Jensen* (2005) 129 Cal.App.4th 62, 70 [28 Cal.Rptr.3d 124]; see also *Trindade v. Superior Court*, *supra*, 29 Cal.App.3d at p. 860.) Because Word was not a party to Oakland's original complaint against Hassey, the statute of limitations was not tolled. The filing of Hassey's cross-complaint against him more than three years after the withholding of his checks was therefore untimely, whether any FLSA violations were willful. (*Ibid.*) Summary judgment as to Word on this cause of action is therefore affirmed.

As to whether the claim was timely as to Oakland, the FLSA provides that an action may be commenced within two years after the cause of action accrued, except that a cause of action arising out of a "willful violation" may be commenced within three years after accrual. (29 U.S.C. § 255(a); see also

[18] Perhaps recognizing this, Hassey states in his reply brief that he no longer challenges the dismissal of Word from the cross-complaint.

McLaughlin v. Richland Shoe Co. (1988) 486 U.S. 128, 129.) We agree with the trial court that Hassey's causes of action began to run when he received his final checks in February and April 1999.[19] (*Biggs v. Wilson* (9th Cir. 1993) 1 F.3d 1537, 1540 [FLSA cause of action accrues on payday when minimum wages are unpaid].) Oakland filed its original complaint on October 17, 2001. That means that Hassey's FLSA cause of action was untimely if the two-year statute of limitations applied, but timely if the three-year statute of limitations applied. (*Hodgson v. Cactus Craft of Arizona* (9th Cir. 1973) 481 F.2d 464, 467.)

An employer has committed a "willful violation" of the FLSA (triggering the three-year statute of limitations) where it "either knew or showed reckless disregard for the matter of whether its conduct was prohibited under the statute." (*McLaughlin v. Richland Shoe Co.*, *supra*, 486 U.S. at p. 133.) Hassey argued below in his opposition to respondents' motion for summary judgment that Oakland's conduct was willful, and that the three-year statute of limitations applied. The trial court's order granting respondents' motion for summary judgment stated, contrary to Hassey's opposition brief and a statement made by his attorney at the hearing on the summary judgment

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[19] We decline to address Hassey's arguments, raised for the first time in his reply brief, that Oakland's attempts to collect on its debt constitute a "continuing violation" of the FLSA that extend the statute of limitations, or that the statute of limitations should be equitably tolled. (*Campos v. Anderson*, *supra*, 57 Cal.App.4th at p. 794, fn. 3.)

motions,[20] that Hassey "agreed that the two-year statute of limitations should be applied." The court applied the two-year statute of limitations, apparently based (at least in part) on the fact that respondents had not addressed whether Hassey had established a willful violation of the FLSA.[21] In other words, it apparently did not reach the issue of whether any violation of the FLSA was "willful." We presume that had it done so, it would have concluded that because there was *no* violation of the FLSA, there certainly was no *willful* violation of the statute.

Having reached the conclusion that withholding Hassey's final paycheck did, in fact, violate the FLSA, we must determine whether there is a question of fact that the violation was "willful," triggering the three-year statute of limitations. "[S]ummary judgment shall be granted if all the papers submitted show that there

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[20] Hassey's counsel argued at the hearing that the three-year statute of limitations applied, and that Oakland's complaint was filed within three years of the accrual of the FLSA cause of action. He later stated that he agreed with a statement by respondents' counsel that the two-year statute of limitations applied "*unless [he could] show that there was a willful violation.*" (Italics added.) Counsel did not agree that the two-year statute of limitations, in fact, applied.

[21] The trial court cited respondents' motion for summary judgment, which stated that respondents would not address whether Hassey had established a willful violation of the FLSA, because his cross-complaint was filed on May 15, 2002, more than three years after Oakland's alleged wrongful acts. Perhaps recognizing that the timeliness of Hassey's claim was tied to the date of the filing of *Oakland's complaint*, respondents in fact argued in their reply brief—as well as at the hearing on the motions for summary judgment—that there was no evidence of a willful violation of the FLSA that triggered the three-year limitations period.

is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Code Civ. Proc., § 437c, subd. (c).) A defendant "has met his or her burden of showing that a cause of action has no merit if that party has shown that . . . there is a complete defense to that cause of action." (Code Civ. Proc., § 437c, subd. (p)(2).) Only when that initial burden is met does the burden shift to plaintiff to show that a triable issue of material fact exists as to that cause of action or a defense thereto. (Ibid.; see also *Knight v. Hayward Unified School Dist.* (2005) 132 Cal.App.4th 121, 128 [33 Cal.Rptr.3d 287].) On appeal, Oakland argues that Hassey's complaint is barred by the two-year statute of limitations, but does not address the alternative three-year statute of limitations. Oakland argued below that there was no evidence of a willful FLSA violation because the MOU training cost reimbursement provision was negotiated, and any alleged violation thus "arose out of an open and fairly negotiated collective bargaining process communicated to applicants, employees and departing employees, and was at most negligent." In light of the fact that it is impermissible to waive by agreement statutory protections of the FLSA (*Brennan v. Veterans Cleaning Service, Inc.*, *supra*, 482 F.2d at p. 1370; *Mayhue's Super Liquor Stores, Inc. v. Hodgson*, *supra*, 464 F.2d at pp. 1197, 1199), we are not persuaded that Oakland established that any violation of the FLSA was not willful, and that there was therefore a complete defense to Hassey's FLSA cause of action. (Code Civ. Proc., § 437c, subds. (c) & (p)(2).) Oakland submitted no evidence about what steps, if any, it took to secure legal advice about its reimbursement policy (cf. *Powell v. Carey Intern., Inc.* (S.D. Fla. 2007) 483

F.Supp.2d 1168, 1175 [summary judgment inappropriate for plaintiff where there was question of fact as to whether defendant acted with knowledge or reckless disregard in not paying overtime]), and no declarations about its state of mind when it instituted such a policy (cf. *Gonzalez v. Rite Aid of New York, Inc.* (S.D.N.Y. 2002) 199 F.Supp.2d 122, 134). Oakland similarly presented no evidence of whether it had notice of past FLSA violations (if any) that would have put it on notice about FLSA requirements. (Cf. *Chao v. A-One Medical Services, Inc.* (9th Cir. 2003) 346 F.3d 908, 919 [affirming summary judgment for plaintiff where testimony of former employees, combined with evidence of past violations, sufficient to show "willful" violation].) Because we cannot determine on the record before us that Oakland was entitled to judgment as a matter of law (Code Civ. Proc., § 437c, subd. (c)), we reverse summary judgment on Hassey's second cause of action as to Oakland.

We conclude, however, that the trial court did not err in denying Hassey's motion for summary judgment on the cross-complaint. A "cross-complainant has met his . . . burden of showing that there is no defense to a cause of action if that party has proved each element of the cause of action entitling the party to judgment on that cause of action." (Code Civ. Proc., § 437c, subd. (p)(1).) Hassey offered no evidence below that Oakland's violation of the FLSA was willful and that the statute of limitations therefore had not expired when he filed his cross-complaint; he simply provided argument in his opposition to respondents' motion for summary judgment. Some of this argument was directed at whether the underlying reimbursement

agreement was lawful, an argument we have previously rejected. Given the factual questions that remain regarding the timeliness of Hassey's cross-complaint, we cannot conclude on this record that Hassey is entitled to judgment in his favor.

3. Three-year statute of limitations did not apply to Hassey's statutory causes of action against Oakland.

Hassey's cross-complaint alleged that the reimbursement clause in the conditional offer, as well as the withholding of money he would have otherwise been paid, violated Labor Code sections 221 and 223 (Hassey's third and fourth causes of action). It also alleged that the conditional offer violated Labor Code sections 432.5 and 450 (Hassey's fifth and sixth causes of action). The trial court ruled that the three-year statute of limitations governing actions "upon a liability created by statute" (Code Civ. Proc., § 338, subd. (a)) barred these four causes of action. This was true with respect to respondent Word, and we therefore affirm summary adjudication as to all four causes of action against him. (*Boyer v. Jensen*, *supra*, 129 Cal.App.4th at p. 70; *Trindade v. Superior Court*, *supra*, 29 Cal.App.3d at p. 860.) As we explained above, however, a three-year statute of limitations does not bar Hassey's claims against Oakland, because they were not time-barred as of the time Oakland filed its original complaint. (*Trindade v. Superior Court*, *supra*, 29 Cal.App.3d at p. 860.)

We next address whether we may affirm summary adjudication as to these causes of action against Oakland for other reasons.

> 4. Trial court erred in granting summary adjudication as to Hassey's third and fourth causes of action (Lab. Code, §§ 221 & 223) against Oakland.

As set forth above, Labor Code sections 221 and 223 prohibit an employer from receiving from an employee any part of wages previously paid, and from secretly paying a lower wage while purporting to pay the wage designated by statute or contract. As we concluded above, these sections do not prohibit Oakland from requiring that Hassey repay his training costs if he leaves the police department before the end five years. (*Ante*, § II.A.)

The withholding of Hassey's final paycheck is another matter. Labor Code section 221 "and related provisions in sections 222 through 223 were enacted in 1937 in response to secret deductions or 'kickbacks' that made it appear as if an employer was paying wages in accordance with an applicable contract or statute, whereas, in fact, the employer was paying less. . . . [T]he Legislature has recognized the employee's dependence on wages for the necessities of life and has, consequently, disapproved of unanticipated or unpredictable deductions because they impose a special hardship on employees." (*Hudgins v. Neiman Marcus Group, Inc., supra*, 34 Cal.App.4th at pp. 1118-1119 [department store not permitted to deduct commissions previously paid for unidentified returns].) We therefore

agree with Hassey insofar as he argues that summary adjudication was inappropriate, since there was a triable issue as to whether the seizure of his final paycheck violated Labor Code sections 221 and 223.[22]

We disagree with the trial court's conclusion that *Kerr's Catering*, *supra*, 57 Cal.2d 319, is entirely distinguishable. *Kerr's Catering* held that an employer was precluded from reducing its employees' salaries in the amount of any cash shortages not attributable to employees' dishonesty or culpable negligence. (*Id.* at pp. 325-326.) Such withholding effectively amounted to "secret deductions or 'kick-backs' " prohibited by Labor Code sections 221-223. (*Kerr's Catering*, *supra*, at pp. 328-329.) Although the deductions at issue in *Kerr's Catering* were different from the ones made here, we agree with Hassey that the underlying policy of protecting an employee's wages is implicated here. (*Id.* at p. 326.)

Oakland points to the fact that Hassey agreed in writing to the repayment term set forth in the conditional offer, reimbursement agreement, and repayment agreement. They do not, however, point to anywhere in the record where Hassey agreed to the withholding of wages owed to him; indeed, the agreements he signed do not provide for such withholdings.

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[22] Again, the parties do not address whether there is a distinction between the withholding of retirement money (as opposed to wages), but they are free to do so on remand. (*Ante*, fn. 14.) Our holding, however, is limited to the seizure of the paycheck.

The question remains whether, as respondents argue, Oakland was authorized by the MOU to deduct amounts owed from Hassey's final paycheck. The MOU provided that repayment of training costs owed from departing employees "shall be due and payable at the time of separation and the City shall deduct any amounts owed under this provision from the employee's final paycheck." Citing Labor Code section 1126, which provides that "[a]ny collective bargaining agreement between an employer and a labor organization shall be enforceable at law or in equity," respondents argue that the paycheck deduction provision was bargained for and enforceable against Hassey. However, an employer may "withhold or divert any portion of an employee's wages" for the benefit of the employee only when such deduction is expressly requested and authorized by the employee in writing, provided that the deduction does not amount to a rebate or deduction from the standard wage arrived at by collective bargaining or pursuant to wage agreement or statute. (Lab. Code, § 224.) Deductions permitted by law to be made from wages pursuant to an employee's written request include insurance premiums, hospital and medical dues and other items that are for the benefit of the employee, not the employer.[23] (3 Ops.Cal.Atty.Gen. 178, 179 (1944).)

[23] Hassey's counsel pointed to the "for the benefit of the employee, not the employer" language at oral argument and suggested for the first time in this appeal that state law differed from federal law with respect to determining whether the reimbursement agreement (as opposed to the withholding of money owed to Hassey) was lawful, because federal law looks to whether a facility is "*primarily* for the benefit" of an employer when determining whether an item may be included in the computation of wages. (Cf. 29 C.F.R. § 531.3(d)(1) (2007), italics added; see *ante*, § II.A.2.)

The trial court found two cases invalidating agreements that purportedly waived nonwaivable rights distinguishable. (*Tunkl v. Regents of University of California* (1963) 60 Cal.2d 92, 94 [32 Cal.Rptr. 33, 383 P.2d 441] [hospital's release from liability for future negligence invalid as against the public interest]; *Benane v. Internat. Harvester Co.* (1956) 142 Cal.App.2d Supp. 874, 875-876, 878-879 [299 P.2d 750] [union's agreement that employees receive time off without pay invalid as conflicting with public policy set forth in Election Code's requirement that no pay be deducted for time spent voting].) We disagree that the cases are distinguishable, in light of the fact that " 'the prompt payment of wages due an employee is a fundamental public policy of this state.' [Citation.]" (*Phillips v. Gemini Moving Specialists* (1998) 63 Cal.App.4th 563, 571 [74 Cal.Rptr.2d 29].) Indeed, it is questionable whether employees may enter into agreements authorizing unlawful deductions. (*Hudgins v. Neiman Marcus Group, Inc., supra*, 34 Cal.App.4th at p. 1124, fn. 14 [because unidentified returns deduction was unlawful, court did not address the issue of whether employees actually entered into an enforceable agreement regarding the deductions].)

We conclude that Oakland failed to demonstrate that it was entitled to judgment as a matter of law on this issue. We therefore reverse summary adjudication as to Hassey's third and fourth causes of action against Oakland and remand to the trial court. We affirm,

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We note that the cited language refers to authorized deductions from paychecks and does not address the definition of "wages," which is defined elsewhere in the Labor Code. (Lab. Code, § 200, subd. (a).)

however, the trial court's denial of Hassey's summary judgment motion on these causes of action, because Hassey did not meet his burden to show that he was entitled to summary judgment. (Code Civ. Proc., § 437c, subd. (p)(1).) Again, there is a question of fact regarding whether Oakland was authorized by the MOU to deduct amounts owed from Hassey's final paycheck.

5. Summary adjudication proper as to Hassey's fifth cause of action (Lab. Code, § 432.5) against respondents.

The fifth cause of action in Hassey's cross-complaint alleged that the conditional offer (as opposed to the withholding of money owed to him) violated Labor Code section 432.5. As set forth above, the statute prohibits employers from requiring employees to agree to any terms or conditions that are prohibited by law. Again, because there was nothing unlawful about requiring Hassey to repay his training costs, there was no violation of this statute. Summary adjudication was therefore appropriate as to Hassey's fifth cause of action against Oakland and Word.

6. Summary adjudication proper as to Hassey's sixth cause of action (Lab. Code, § 450) against respondents.

The sixth cause of action in Hassey's cross-complaint alleged that the conditional offer (as opposed to the withholding of money owed to him) violated Labor Code section 450. Subdivision (a) of the statute provides that "[n]o employer . . . may compel or coerce

any employee, or applicant for employment, to patronize his or her employer, or any other person, in the purchase of any thing of value " We agree with the trial court's conclusion that *California State Restaurant Assn. v. Whitlow* (1976) 58 Cal.App.3d 340 [129 Cal.Rptr. 824], the only case upon which Hassey relies to support his argument regarding this cause of action, is distinguishable. *Whitlow* held that an employer is prohibited from requiring an employee who makes minimum wage to take meals as part of his compensation and to have the value of the meals deducted from the minimum wage *without the written consent of the employee.* (*Id.* at p. 343.)

Here, by contrast, Hassey agreed *in writing* to reimburse Oakland for his training costs if he left the police department in fewer than five years, and the MOU authorized such an agreement. "[T]he California Legislature did not intend by section 450 of the Labor Code to override the provisions of an otherwise lawful collective bargaining agreement . . . A contrary interpretation would mean that employees are 'coerced' or 'compelled,' within the meaning of section 450, by the terms of a collective bargaining agreement between their employer and their duly authorized bargaining representative, in the absence of any claim that the representative has breached its duty of representing them fairly." (*Porter v. Quillin* (1981) 123 Cal.App.3d 869, 876 [177 Cal.Rptr. 45].) Summary adjudication as to Hassey's sixth cause of action is affirmed.

7. Summary adjudication proper as to seventh and eighth causes of action against respondents.

The seventh cause of action in Hassey's cross-complaint alleged that the reimbursement clause contained in the conditional offer was an "unlawful contract," in violation of Civil Code sections 1667 and 1668. The eighth cause of action alleged that the conditional offer was an impermissible restraint on Hassey's ability to change jobs, in violation of Business and Professions Code section 16600. Again, as set forth above (§ II.A.2.), nothing "restrained [Hassey] from engaging in [his] lawful trade, business or profession." (*Kolani v. Gluska, supra*, 64 Cal.App.4th at p. 407.)[24] Because the seventh and eighth causes of action were directed solely to the conditional offer, we need not decide whether any agreement to deduct training costs from Hassey's checks violated any statutes.

8. Summary adjudication proper as to ninth cause of action against respondents.

The ninth cause of action in Hassey's cross-complaint alleged that the conditional offer violated Business and Professions Code section 17200, because the repayment provision was an unlawful, unfair or fraudulent business practice. The trial court granted summary judgment as to Oakland, concluding that the city was not a " 'person' " as set forth in Business and

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[24] The trial court also found that the seventh cause of action was barred by a three-year statute of limitations. We need not address whether the trial court erred on this point, as the trial court relied on another, valid ground to grant summary adjudication.

Professions Code section 17201.[25] The trial court granted summary judgment as to respondent Word, concluding that he had been sued "solely in his official capacity as the Chief of Police." On appeal, Hassey does not address these conclusions in his opening brief, and he states in his reply brief that he "does not desire to contest on appeal the applicability" of section 17200. Summary adjudication as to this cause of action is affirmed.

Finally, Hassey argues generally that public employment is held by statute and not by contract, that the reimbursement agreement was never adopted by the city civil service commission, and that Oakland cannot deal directly with represented employees. He directs these arguments to no particular causes of action. Having stated only a vague general legal principle without directing this court to the portion of the record which supports his contention, we treat this issue as waived. (*Guthrey v. State of California* (1998) 63 Cal.App.4th 1108, 1115 [75 Cal.Rptr.2d 27].)

Respondents raised legal arguments below in support of their summary judgment motion that the trial court did not reach. They raise one of them in passing on appeal (with respect to Oakland) as an alternate ground to affirm. Citing Government Code section 818.2, which provides that "[a] public entity is not liable for an injury caused by adopting or failing to adopt an enactment or by failing to enforce any law,"

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[25] Business and Professions Code section 17201 provides, "As used in this chapter, the term person shall mean and include natural persons, corporations, firms, partnerships, joint stock companies, associations and other organizations of persons."

respondents argue that "to the extent that the cross-claims arise out of alleged injuries resulting from the City's adoption (via resolution) and enforcement of the MOU between it and the [Oakland Police Officers' Association], it cannot be held liable." The cited statutory provision provides immunity only for " 'legislative or quasi-legislative action, and the discretion of law enforcement officers in carrying out their duties.' " (*Morris v. County of Marin* (1977) 18 Cal.3d 901, 916-917 [136 Cal.Rptr.251, 559 P.2d 606], italics omitted.) Because we have focused on Oakland's potential liability with respect to withholding Hassey's final paycheck, and not on any legislative or quasi-legislative action by the city, Government Code section 818.2 does not provide Oakland with immunity.

Respondents also argue in passing that Hassey cannot represent individuals who were hired by Oakland as lateral-entry police officers, as he alleged in his cross-complaint. Although this may be true (and the argument may certainly be raised again on remand), this is not a valid alternate basis to affirm summary judgment, because it would not limit any relief Hassey would otherwise be entitled to in his position as a former police officer trainee. Our opinion does not preclude the filing of a future motion for summary judgment premised on additional facts or on legal arguments other than those rejected in this opinion.

III. DISPOSITION

The judgment is affirmed in part and reversed in part. Summary judgment in favor of Oakland on its complaint against Hassey is affirmed. The denial of Hassey's summary judgment motion on Oakland's complaint is affirmed. Summary judgment in favor of respondent Word on all of the causes of action in Hassey's cross-complaint is affirmed. Summary adjudication in favor of Oakland as to the first, fifth, sixth, seventh, eighth, and ninth causes of action in Hassey's cross-complaint is affirmed. Summary adjudication as to the second, third, and fourth causes of action in Hassey's cross-complaint against Oakland is reversed. The denial of Hassey's summary judgment motion on his cross-complaint is affirmed. The case is remanded to the trial court for proceedings consistent with the views expressed in this opinion. Each side shall bear its own costs incurred on appeal.

s/
Sepulveda, J.

We concur:
Ruvolo, P. J.
Rivera, J.

Trial Court: Alameda County Superior Court
Trial Judge: Honorable Winifred Y. Smith
Counsel for Appellant: Law Offices of Jon Webster; Jon Webster, Alexandra Seldin and Michael Devin
Counsel for Respondents: John A. Russo, City Attorney, Randolph W. Hall, Chief Assistant City Attorney, Kandis A. Westmore, Deputy City Attorney

APPENDIX B

FILED
ALAMEDA COUNTY
SEP 19 2006
CLERK OF THE SUPERIOR COURT
By ___s/_____ Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF ALAMEDA

CITY OF OAKLAND, Plaintiff, vs. KENNY D. HASSEY, Defendant. AND RELATED CROSS-COMPLAINT.	No. 2001-027607 ORDER GRANTING MOTION OF PLAINTIFF AND CROSS-DEFENDANT CITY OF OAKLAND, AND CROSS-DEFENDANT RICHARD WORD, CHIEF OF POLICE, FOR SUMMARY JUDGMENT

The Motion of Plaintiff and Cross-Defendant City of Oakland, and Cross Defendant Richard Word, Chief of Police (collectively, "City"), for Summary Judgment Or Summary Adjudication on the City's Complaint, dated October 17, 2001, against Defendant Kenny D. Hassey, and on the Cross-Complaint of

Kenny D. Hassey, Matthew J. DeLorenzo and Chris Baker against the City and Police Chief Richard Word, filed on May 10, 2002, was heard on September 14, 2006, at 9:00 a.m., in Department 31. Kandis A. Westmore, Esq., appeared for the City and Chief Word. Jon Webster, Esq., appeared for Defendant and Cross-Complainant Kenny D. Hassey, and Cross-Complainants Matthew J. DeLorenzo and Chris Baker. The Court having reviewed the parties' written submissions and considered the arguments presented by counsel, HEREBY GRANTS the City's Motion for Summary Judgment as follows:

The City's Motion for Summary Judgment on the Complaint against Hassey for breach of contract is GRANTED. There are no genuine disputes concerning the fact that Defendant Hassey signed the following agreements: (1) "Conditional Offer of Employment"; (2) "Reimbursement of Training Expenses"; and (3) Training Costs Repayment Agreement." Hassey confirmed in all of these agreements that he would be obligated to repay some or all of the cost to train him to become a police officer at the Oakland Police Academy if he voluntarily left the Police Department within five years. There is no dispute that Hassey resigned on February 10, 1999, which was less than a year after the commencement of his employment in March 1998. The City deducted $725.28 from Hassey's final check in February 1999, and $654.80 from the vacation check in April 1999. The amount due and owing after these deductions was $6,619.92. Defendant Hassey does not dispute the City's contention that he never made any further payments after the above amounts were deducted by the City.

The City's Motion for Summary Judgment is GRANTED as to the Second Cause of Action in the Cross-Complaint as to Hassey because he did not file his action within the two-year limitations period provided in 29 U.S.C. § 255(a).[1] Hassey alleges that the City violated the Fair Labor Standards Act and 29 C.F.R. § 531.35 (final and unconditional payment of wages) when it made the unauthorized deductions in February and April 1999. The Cross-Complaint was filed on May 10, 2002. The City's Motion is also GRANTED as to Cross-Complainants DeLorenzo and Baker, because the record clearly shows that the City never deducted any amounts from their pay or collected any amounts from them for the training costs incurred. The record shows that the City made efforts to collect the amounts owed by DeLorenzo and Baker, but they have refused to make any payments. During oral argument, counsel for Cross-Complainants argued that DeLorenzo and Baker did suffer actual injury because they did not receive their wages "finally" and "unconditionally," as required by 29 C.F.R. § 531.35, during the entire period of their employment with the City. The Court rejects Cross-Complainant's interpretation of 29 C.F.R. § 531.35. The fact that Cross-Complainants may be required to repay the City some or all of the cost of their training if they elected to resign voluntarily within five years does not render

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[1] Cross-Complainants agreed that the two-year statute of limitations should be applied. The Court notes that the City invited the Court to apply the longer three-year period because the Cross-Complaint was filed more than three years after April 1999. Plaintiff's Memo., 8:26-9:1 ("Therefore, defendants [sic] will not argue the issue of whether he can establish a willful violation of the Act.").

all of their wages "conditional."

The City's Motion for Summary Judgment is GRANTED as to the Third, Fourth, Fifth, Sixth and Seventh Causes of Action as to Hassey because they are barred by the three-year statute of limitations set forth in CCP § 338(a). *See Aubry v. Goldhor* (1988) 201 Ca1.App.3d 399, 404. The City's Motion is GRANTED as to these Causes of Action as to the Cross-Complaint of DeLorenzo and Baker because they have not suffered any legally cognizable damages as a result of the City's alleged statutory violations for the reasons set forth above.

Finally, the City's Motion for Summary is GRANTED as to the Seventh and Eighth Causes of Action. Cross-Complainants have not shown that triable issues of material fact exist concerning the validity of the agreements that prospective police officer trainees were required to sign in the period from 1998 to 2000. Indeed, there is legal authority for the City's position that contracts requiring employees to reimburse all or some training costs under the circumstances at issue here are valid under the Fair Labor Standards Act. *See Heder v. City of Two Rivers* (7th Cir. 2002) 295 F.3d 777,782-783.

The City's Motion for Summary Judgment is GRANTED as to the Ninth Cause of Action for Unfair Competition. The City is not a "person" within the definition of Bus.& Prof. Code § 17201. *See Trinkle v. California State Lottery* (1999) 71 Cal.App.4th 1198, 1202. The Motion is also GRANTED as to Chief Word because he is sued solely in his official capacity as the

Chief of Police.

The Court declines to address in this order the numerous other legal grounds asserted by the City in support of its Motion for Summary Judgment because all of the Causes of Action in the Complaint and the Cross-Complaint are disposed of on the grounds set forth herein.

The City shall file and serve a Notice of Entry of Order. The City shall also prepare a proposed form of Judgment and to have counsel for Defendant and Cross-Complainants approve the Judgment as to form. The proposed Judgment shall be submitted to the Court no later than October 3, 2006.

IT IS SO ORDERED.

Dated SEP 19 2006

s/
Winifred Y. Smith
Judge of the Superior Court

APPENDIX C

FILED
ALAMEDA COUNTY
SEP 19 2006
CLERK OF THE SUPERIOR COURT
By ___s/___ Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF ALAMEDA

CITY OF OAKLAND, Plaintiff, vs. KENNY D. HASSEY, Defendant. AND RELATED CROSS-COMPLAINT.	No. 2001-027607 ORDER DENYING MOTION OF DEFENDANT AND CROSS-COMPLAINANT KENNY HASSEY, AND CROSS-COMPLAINANTS HASSEY, MATTHEW DELORENZO AND CHRIS BAKER FOR SUMMARY JUDGMENT OR SUMMARY ADJUDICATION

The Motion of Defendant Kenny D. Hassey and Cross-Complainants Hassey, Matthew J. DeLorenzo and Chris Baker for Summary Judgment or Summary Adjudication on the Complaint of the City of Oakland for Breach of Contract, filed on October 17, 2001, and the Cross-Complaint against the City and Richard Word, Chief of Police, filed on May 10, 2002, was heard on September 14, 2006, at 9:00 a.m., in Department 31. Kandis A. Westmore, Esq., appeared for the City and Chief Word. Jon Webster, Esq., appeared for Defendant and Cross-Complainant Kenny D. Hassey, and Cross-Complainants Matthew J. DeLorenzo and Chris Baker. The Court having reviewed the parties' written submissions and considered the arguments presented by counsel, HEREBY DENIES the Motion on the grounds set forth in the Court's separate order granting the Motion for Summary Judgment of the City and Chief Word, and for the following additional reasons:

The Court finds that Cross-Complainants have not shown that the provision in the Memoranda of Understanding ("MOU") between the City and the Oakland Police Officers Association requiring police officer trainees and police officers, to reimburse some or all of the cost of their required training if they voluntarily resign within 5 years from the date of hire violates the Fair Labor Standards Act (29 U.S.C. § 201 et seq.), 29 C.F.R. § 531.35, Labor Code §§ 201, 221, 223, 432.5 and 450, Civil Code §§ 1667 and 1668, and Bus.& Prof. Code §§ 16600 and 17200. *See, e.g., Heder v. City of Two Rivers* (2002) 295 F.3d 777, 782-783. Cross-Complainants' argument that the City improperly attempts to circumvent the requirements of

the FLSA and other laws through collective bargaining and by private contracts with its employees is not supported by law. The *Heder* decision clearly holds that a requirement that employees reimburse certain training costs if they resign before the employer receives its intended benefit from the training does not violate the FLSA.

The parties agree that police officer applicants without the basic training required under state law for all peace officers were required to sign two agreements acknowledging their reimbursement obligations under the MOU: (1) "Conditional Offer of Employment"; and (2) "Repayment Acknowledgement." The parties agree that the reimbursement obligation is conspicuously set forth in these agreements, and that officers must sign them in order to join the police department. The City's requirement that applicants who join the police force without the basic police training required by state law sign agreements acknowledging their awareness and understanding of the reimbursement provision in the MOU does not violate the Fair Labor Standards Act provisions with respect to the payment of minimum wages and the payment of wages without any requirement of a "kick back." 29 C.F.R. § 531.35.

Cross-Complainants' argument that the City violates 29 C.F.R. § 531.35 each time it pays its officers who have signed the reimbursement agreements because the payments are not "final" or "unconditional" is not supported by a common sense interpretation of the provision. The City pays the police officer trainees a salary well above the minimum wage during the several months of their training, and the officers are

under no obligation to return any of that salary if they leave the force for any reason. The statute cited by Cross-Complaints in support of their claim, 29 U.S.C. § 206, only prohibits practices that result in the payment of wages below the national minimum wage. Cross-Complainants made no showing that they were effectively paid less than the minimum wage by the City. Indeed, Hassey states in the papers that he earned an hourly wage of $23.39 while employed by the City from March 1998 to February 1999. During oral argument, counsel argued that the three United States Department of Labor opinion letters clearly support Cross-Complainants' position. Having reviewed the opinion letters again, the Court does not agree with counsel's argument. The 1992 and 2005 opinion letters are not applicable because the alleged policies challenged therein require police officers to reimburse the salaries that they were paid during, the period of their training. The policy of the State of Washington challenged in the 1999 opinion letter appears to be similar to the City's reimbursement policy, but it is not clear from the brief opinion that the employees are required to reimburse training costs only and not salary paid during training. Although the Court finds the opinion letters instructive on the issues presented by FLSA provisions, they have limited value as precedent because they are based solely on the representations made by the parties seeking the opinion. In this case, the Court concludes that the holding in Heder provides the most pertinent source of authority.

Finally, the City's requirement that police officers reimburse the City some or all of the cost of their training in the Oakland Police Academy does not violate public policy or any provision of the California Labor Code. The Court concludes that the cases cited by Cross-Complainants in support of their motion, and in particular the *Kerrs' Catering*, *Benane*, *Tunkl* and *Whitlow* cases, are distinguishable. The Court finds that the City's requirement is not unconscionable. Although applicants cannot negotiate away the reimbursement term, they may choose to seek employment with other law enforcement agencies or obtain training in another academy certified by the Commission on Peace Officer Standards of Training prior to applying for employment. The record clearly establishes that the City's reimbursement provision only applies to applicants without the basic training required of all peace officers under state law.

IT IS SO ORDERED.

Dated SEP 19 2006

s/
Winifred Y. Smith
Judge of the Superior Court

APPENDIX D

JOHN A. RUSSO,
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RANDOLPH W. HALL,
Chief Assistant City Attorney - SB #080142
PELAYO A. LLAMS, JR.,
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Attorneys for Plaintiff/Cross-Defendants
CITY OF OAKLAND and RICHARD WORD

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF ALAMEDA
UNLIMITED JURISDICTION

CITY OF OAKLAND, a Municipal Corporation,
Plaintiff,
v.

KENNY D. HASSEY, and Does 1 through 10, inclusive.
Defendants.

KENNY D. HASSEY on behalf of himself and all others similarly situated,
Cross-Complainants,
v.
CITY OF OAKLAND, and RICHARD WORD, individually and in his official capacity as Chief of the Oakland Police Department, and ROES 1 through 50, inclusive,
Cross-Defendants.

Case No. 2001027607

NOTICE OF ENTRY OF JUDGMENT "BY FAX"

TO ALL PARTIES IN THE ABOVE-REFERENCED ACTION:

The Court granted the attached Judgment In Favor of the City of Oakland on October 5, 2006. A copy of the judgment is attached hereto as Exhibit A.

DATED: October 10, 2006

JOHN A. RUSSO,
City Attorney
RANDOLPH W. HALL,
Chief Assistant City Attorney
RACHEL WAGNER,
Supervising Trial Attorney
PELAYO A. LLAMA, JR.,
Deputy City Attorney

By: s/
Attorneys for Plaintiff/Cross-Defendants
CITY OF OAKLAND and RICHARD WORD

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Attorneys for Plaintiff/Cross-Defendants
CITY OF OAKLAND and RICHARD WORD

FILED
ALAMEDA COUNTY
OCT 05 2006
CLERK OF THE SUPERIOR COURT
By s/ Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF ALAMEDA
UNLIMITED JURISDICTION

CITY OF OAKLAND, a Municipal Corporation, Plaintiff, v. KENNY D. HASSEY, and Does 1 through 10, inclusive. Defendants.	Case No. 2001027607 JUDGMENT IN FAVOR OF THE CITY OF OAKLAND
KENNY D. HASSEY on	

behalf of himself and all other similarly situated,

Cross-Plaintiff,

v.

CITY OF OAKLAND, and RICHARD WORD, individually and in his official capacity as Chief of the Oakland Police Department, and ROES 1 through 50, inclusive,

Cross-Defendants.

On September 19, 2006, this Court granted summary judgment to in favor of Plaintiff City of Oakland and against Defendant Kenny D. Hassey as to all claims set forth in the complaint dated October 17, 2001 and found that said Defendant Hassey owes the amount of Six Thousand, Six Hundred Nineteen Dollars and Ninety-Two Cents ($6,619.92) to Plaintiff City of Oakland; and

Further on September 19, 2006, this Court granted summary judgment to Cross-Defendants City of Oakland and Richard Word and against Cross-Complainants Kenny D. Hassey, Mathew J. Delorenzo, and Chris Baker as to all claims in the cross-complaint dated May 10, 2002; and

Further, on September 19, 2006, this Court denied the motion for summary judgment and/or adjudication brought by Defendant Kenny D. Hassey on the complaint filed on October 17, 2001; and

Further, on September 19, 2006, this Court denied the motion for summary judgment and/or adjudication brought by Cross-Complainants Kenny D. Hassey, Mathew J. Delorenzo, and Chris Baker as to all claims in the cross-complaint filed May 10, 2002;

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED AS FOLLOWS:

1) That judgment is hereby entered in favor of Plaintiff City of Oakland against Defendant Kenny D. Hassey in the amount of Six Thousand, Six Hundred Nineteen Dollars and Ninety-Two Cents ($6,619.92) on the Complaint filed October 17, 18 2001;

2) That judgment is hereby entered in favor of Cross-Defendants City of Oakland and Richard Word and against Cross-Complainants Kenny D. Hassey, Mathew J. Delorenzo, and Chris Baker as to all claims in the Cross-Complaint filed May 10, 2002 and that Cross-Complainants shall take nothing from Cross-Defendants; and

3) Defendant and Cross-Complainants shall pay recoverable costs, disbursements, and expenses as will be stated in the City of Oakland's Memorandum of Costs to be filed separately.

DATED: OCT 05 2006

s/
WINIFRED Y. SMITH
Judge of the Superior Court

Approved as to Form:
s/ 10/2/2006
JON WEBSTER, ESQ.

APPENDIX E

CERTIFIED FOR PUBLICATION
Court of Appeal, First Appellate District

FILED
JUL 15 2008
Diana Herbert, Clerk

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA FIRST APPELLATE DISTRICT DIVISION FOUR

CITY OF OAKLAND, Plaintiff, Cross-defendant and Respondent, v. KENNY D. HASSEY, Defendant, Cross-complainant and Appellant; RICHARD WORD, Cross-defendant and Respondent.	A116360 (Alameda County Super. Ct. No. 2007027607) (Alameda County Super. Ct. No. 2007027607) ORDER DENYING REHEARING AND MODIFYING OPINION [NO CHANGE IN JUDGMENT]

BY THE COURT:

Appellant's petition for rehearing is denied. The opinion filed June 17, 2008, is modified as follows:

Add, as the last three sentences of the eleventh paragraph in part II.A.2. of the opinion, "We decline to address Hassey's argument, raised for the first time in his reply brief, that the repayment agreement violates the Labor Code sections 2802 [employer shall indemnify employee for all necessary expenditures and losses] and 2804 [any contract waiving provision invalid]. (Campos v. Anderson (1997) 57 Cal.App.4th 784, 794, fn. 3 [points raised in reply brief for first time will not be considered absent good cause].) We note that Hassey's answer to Oakland's complaint did not rely on Labor Code sections 2802 and 2804, and his cross-complaint did not allege causes of action based on them."

The above modification does not effect any change in the judgment.

Dated: JUL 15 2008

s/ RUVOLO, P.J. ___ P.J.

APPENDIX F

CERTIFIED FOR PUBLICATION
Court of Appeal, First Appellate District

FILED
JUL 17 2008
Diana Herbert, Clerk

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA FIRST APPELLATE DISTRICT DIVISION FOUR

CITY OF OAKLAND, Plaintiff, Cross-defendant and Respondent, v. KENNY D. HASSEY, Defendant, Cross-complainant and Appellant; RICHARD WORD, Cross-defendant and Respondent	A116360 (Alameda County Super. Ct. No. 2007027607) ORDER DENYING REHEARING AND MODIFYING OPINION [NO CHANGE IN JUDGMENT]

BY THE COURT:

The opinion filed June 17, 2008, and modified July 15, 2008, is further modified as follows:

The following language, added by the July 15, 2008 modification order, is to be inserted as the last three sentences of the last paragraph starting on page 12 of the filed opinion and ending on page 13 with the words "are inapplicable."

> "We decline to address Hassey's argument, raised for the first time in his reply brief, that the repayment agreement violates the Labor Code sections 2802 [employer shall indemnify employee for all necessary expenditures and losses] and 2804 [any contract waiving provision invalid]. (Campos v. Anderson (1997) 57 Cal.App.4th 784, 794, fn. 3 [points raised in reply brief for first time will not be considered absent good cause].) We note that Hassey's answer to Oakland's complaint did not rely on Labor Code sections 2802 and 2804, and his cross-complaint did not allege causes of action based on them."

The above modification does not effect any change in the judgment.

Dated: JUL 17 2008

s/ RUVOLO, P.J. P.J.

APPENDIX G

SUPREME COURT
FILED
SEP 17 2008
Frederick K. Ohlrich Clerk

Court of Appeal, First Appellate District, Div. 4 -No. A116360
S165462

IN THE SUPREME COURT OF CALIFORNIA
En Banc

CITY OF OAKLAND, Plaintiff, Cross-defendant and Respondent,

v.

KENNY D. HASSEY, Defendant, Cross-complainant and Appellant;

RICHARD WORD, Cross-defendant and Respondent.

The petition for review is denied.

The request for an order directing depublication of the opinion is denied.

Kennard, J., is of the opinion the petition should be granted.

s/ GEORGE
Chief Justice

APPENDIX H

1992 WL 845111

Wage and Hour Division
United States Department of Labor

Opinion Letter
Fair Labor Standards Act (FLSA)
October 21, 1992

***

This is in further response to your inquiry concerning the application of the Fair Labor Standards Act to a client formerly employed as a police officer by the Town of

You state that the officer was hired in August 1991 and that he terminated his employment with the Town approximately six months after completing the mandated basic police officer training course. Subsequent to his hiring, the Town entered into a collective bargaining agreement (CBA) with the Union representing the police officers. The CBA was made retroactive to January 1, 1991.

The CBA includes a provision that allows the Town to recover (on a pro-rata basis) the salary paid to the employee during the time the employee was attending the training course if the employee resigns from the *** Police Department to accept a position with another law enforcement agency less than four years after completing the training course. Since your client resigned less than two years after completing the

basic training course, the CBA allows the employer to recoup 100 percent of the salary paid during the time the employee was attending basic training.

You state that the Town has commenced an action seeking return of all wages paid to the employee for this period pursuant to this provision. In light of § 206 (minimum wage provisions) of the FLSA, you ask whether this provision violates the FLSA.

The answer is yes. The FLSA requires that all covered and nonexempt employees must be paid at least $4.25 an hour and not less than one and one-half times their regular rates of pay for all hours worked over 40 in a workweek. Hours worked under the FLSA include basic training time. See §553.226(c) of 29 CFR 553 and §§ 785.27 -785.32 of 29 CFR 785.

Wages cannot be considered to have been paid by the employer and received by the employee unless they are paid finally and unconditionally or "free and clear." The wage requirements of the FLSA will not be met where the employee "kicks-back" directly or indirectly to the employer or to another person for the employer's benefit the whole or part of the wage delivered to the employee. See §531.35 of 29 CFR Part 531.

The United States Supreme Court has held that an employee may not waive his or her rights to compensation due under the FLSA. Brooklyn Sayings Bank v. O'Neil, 328 U.S. 697 (1945). Similarly, in Barrentine v. Arkansas-Best Freight System, 450 U.S. 728 (1981), the Supreme Court held that a labor organization may not negotiate a provision that waives employees' statutory rights under the FLSA. Consequently, the return to the employer of compensation due an employee under the FLSA would violate the Statute.

We trust that the above information is responsive to your inquiry.

Sincerely,

Daniel F. Sweeney
Deputy Assistant Administrator

1992 WL 845111 (DOL WAGE-HOUR)

APPENDIX I

1999 WL 1788152

Wage and Hour Division
United States Department of Labor

Opinion Letter
Fair Labor Standards Act (FLSA)
September 3, 1999

***

This is in response to your letter requesting the Department's position on the application of the Fair Labor Standards Act (FLSA) to required reimbursements for internal training costs. You specifically ask if it is permissible for an employer to establish a repayment plan for employee internal training costs which would require an employee who leaves employment within an agreed-upon time period after receiving training to reimburse the employer tor such training. The repayment plan would include an agreed upon value of the internal training and would be signed by the employee prior to receiving thc training.

The Wage and Hour Division of the Department of L abor administers and enforces the Fair Labor Standards Act (FLSA), which is the Federal law of most general application concerning wages and hours of work. This law requires that all covered and nonexempt employees be paid not less than the minimum wage, $5.15 an hour, effective September 1, 1997, for all hours worked. Overtime pay of not less

than one and one-half times the regular rate of pay is required for all hours worked over 40 in a workweek. Hours worked under the FLSA include required internal training time. See Sections 785.27 through 785.32 of 29 CFR Part 785 (copy enclosed).

Wages cannot be considered to have been paid by the employer and received by the employee unless they are paid finally and unconditionally or "free and clear." The wage requirements of the FLSA will not be met where the employee "kicks-back" directly or indirectly to the employer or to another person for the employer's benefit the whole or part of the wage delivered to the employee, if such payments bring the employee's pay below the required minimum wage or overtime levels. See Section 731.35 of the enclosed 29 CFR Part 531.

The United States Supreme Court has held that an employee may not waive his or her rights to compensation due under the FLSA. Brooklyn Savings Bank v. O'Neil, 328 U.S. 697 (1945). Similarly, in Barrentine v. Arkansas-Best Freight System, 450 U.S. 728 (1981), the Supreme Court held that a labor organization may not negotiate a provision that waives employees' statutory rights under the FLSA. Consequently, the return to the employer of compensation due an employee under the FLSA would violate the statute. It is our opinion that, where a repayment plan would result in an employee receiving less than the wages required by the FLSA, it would violate the provisions of the FLSA.

This opinion is based exclusively on the facts and circumstances described in your request and is given on the basis of your representation, explicit or implied, that you have provided a full and fair description of all the facts and circumstances that would be pertinent to our consideration of the question presented. Existence of any other factual or historical background not contained in your request might require a different conclusion than the one expressed herein.

We trust that this information is responsive to your inquiry.

Sincerely,

Daniel F. Sweeney
Office of Enforcement Policy Fair Labor Standards Team

Enclosures

1999 WL 1788152 (DOL WAGE-HOUR)

APPENDIX J

1999 WL 1788162

Wage and Hour Division
United States Department of Labor

Opinion Letter
Fair Labor Standards Act (FLSA)
September 30, 1999

***

This is in response to your letter requesting an opinion concerning the application of the Fair Labor Standards Act (FLSA) to the compensability of time spent on tests for promotion and the legality of training reimbursement agreements. You represent a number of law enforcement labor organizations in ***

As you know, the FLSA is the Federal law of most general application concerning wages and hours of work. This law requires that all covered and nonexempt employees be paid not less than the minimum wage, $5.15 an hour, effective September 1, 1997, for all hours worked. Overtime pay of not less than one and one-half times the regular rate of pay is required for all hours worked over 40 in a workweek. Hours worked under the FLSA include required internal training time. See Sections 785.27 through 785.32 of 29 CFR Part 785.

The first issue of your client's concern relates to the compensability of time spent on tests for promotion within a police department. Tests for promotion are administered through the Civil Service Board which undertakes fairly exhaustive testing including both written and oral assessment boards. The total testing process, not including the study preparation time, may take several hours. Officers who are scheduled for the normal work shifts may receive release time for purposes of taking the test and, therefore, would receive their regular pay. Otherwise, officers receive no compensation for taking the test. You advised a member of my staff that while the State of Washington requires a testing process for a police officer to become a commissioned police officer, each city/county establishes and administers its own testing method. You also advised that employees mayor may not choose to take the test for promotion (i.e., the test is strictly voluntary). For those employees who do not wish to be promoted and do not take the test, they would remain in their current positions without any adverse impact.

Based on the information presented, it is our opinion that the time spent by employees who voluntarily spend time on tests for promotion outside their regular hours of work is for the benefit of these employees, and is not compensable hours of work under the FLSA. See section 553.226 of 29 CFR Part 553.

The second issue of your client's concern is the legality of any reimbursement agreements under the FLSA by which employees who depart the department within three years of being hired are expected to pay back the employer for their training.

Wages cannot be considered to have been paid by the employer and received by the employee unless they are paid finally and unconditionally or "free and clear." The wage requirements of the FLSA will not be met where the employee "kicks-back" directly or indirectly to the employer or to another person for the employer's benefit the whole or part of the wage delivered to the employee, if such payments bring the employee's pay below the required minimum wage or overtime levels. See section 531.35 of the 29 CFR Part 531.

The United States Supreme Court has held that an employee may not waive his or her rights to compensation due under the FLSA. Brooklyn Savings Bank v. O'Neil, 328 U.S. 697 (1945). Similarly, in Barrentine v. Arkansas-Best Freight System, 450 U.S. 728 (1981), the Supreme Court held that a labor organization may not negotiate a provision that waives employees' statutory rights under the FLSA. Consequently, the return to the employer of compensation due an employee under the FLSA would violate the statute.

It is our opinion that, where a reimbursement agreement would result in an employee receiving less than the wages required by the FLSA, it would violate the provisions of the FLSA.

This opinion is based exclusively on the facts and circumstances described in your request and is given on the basis of your representation, explicit or implied, that you have provided a full and fair description of all the facts and circumstances which would be pertinent to our consideration of the question presented. Existence of any other factual or historical background not contained in your request might require a different conclusion than the one expressed herein. You have also represented that this opinion is not sought on behalf of a client or firm which is under investigation by the Wage and Hour Division, or which is in litigation with respect to, or subject to the terms of any agreement or order applying, or requiring compliance with, the provisions of the FLSA.

We trust that this information is responsive to your inquiry.

Sincerely,

Daniel F. Sweeney
Office of Enforcement Policy Fair Labor Standards Team

1999 WL 1788162 (DOL WAGE-HOUR)

APPENDIX K

2005 WL 2086807

Wage and Hour Division
United States Department of Labor

Opinion Letter
Fair Labor Standards Act (FLSA)
FLSA2005-18
May 31, 2005

***

This is in response to your letter requesting an Opinion on the application of the Fair Labor Standards Act (FLSA) to required reimbursements for internal training costs.

You state that a police officer employed by the City of *** (the City) on May 16, 2000, left employment on October 15, 2000, and has subsequently accepted a job with the City of the ***. The officer attended required CLEET training (the basic police course) from June 4, 2000, until August 4, 2000, and was paid $3,202.24 in wages during the training period.

The applicable Oklahoma statute, Title 70 O.S., Section 3311(M) provides that if an employing law enforcement agency has paid the salary of a person while attending a basic police course approved by the Council, and if that person within (1) year after certification resigns and is hired by another law enforcement agency in the same state, the second employing agency or the person who received the

training must reimburse the original employment agency for the salary paid to the person who completed the basic police course. You ask whether the second employing agency or the officer is required to reimburse the City the full amount of the salary he received while in training as required by state statute or only the amount of the salary in excess of the applicable minimum wage.

The FLSA is the Federal law of most general application concerning wages and hours of work. This law requires that all covered and nonexempt employees be paid not less than the minimum wage for all hours worked and overtime pay for all hours worked over 40 in a workweek. Hours worked under the FLSA include required basic training time, such as the training hours in this case. See 29 CFR sections 785.27 through 785.32 and section 553.226 (copies enclosed) .

Wages cannot be considered to have been paid by the employer and received by the employee unless they are paid finally and unconditionally or "free and clear". The wage requirements of the FLSA will not be met where the employee "kicks-back" directly or indirectly to the employer or to another person for the employer's benefit the whole or part of the wage delivered to the employee, if such payments bring the employee's pay below the required minimum wage or overtime levels. See Section 531.35 of the enclosed 29 CFR Part 531.

The United States Supreme Court has held that an employee may not waive his or her rights to compensation due under the FLSA. Brooklyn Savings Bank v. O'Neil, 328 U.S. 697 (1945). Similarly, in Barrentine v. Arkansas-Best Freight System, 450 U.S. 728 (1981), the Supreme Court held that a labor organization may not negotiate a provision that waives employees' statutory rights under the FLSA. Consequently, the return from the employee to the employer of compensation due an employee pursuant to the FLSA minimum wage and/or overtime requirements would violate the statute.

It is thus our opinion that any reimbursement paid by the officer that will result in payment of less than the amount required by the applicable minimum wage and/or overtime requirements will violate the "free and clear" provisions of the FLSA. See opinion letters dated October 21, 1992 and September 30, 1999; Heder v. City of Two Rivers, 295 F.3d 777 (7th Cir. 2002). Because the FLSA establishes a floor for required compensation, state or local laws may require greater amounts but, pursuant to the Supremacy Clause, may not diminish the protections of the Act. See 29 U.S.C. § 218 (a); U.S. Constitution, Art. VI, Cl. 2. You asked whether, in the alternative, the second employing agency could be required to reimburse the City. The FLSA regulates employee wages, but it does not control this arrangement under state law between the two cities. Thus, the FLSA does not affect any state law remedy the city may have against the second agency.

This opinion does not affect the ability of the City to pursue the recovery from the other agency of any unpaid amounts due for such cost based upon a state statute.

This opinion is based exclusively on the facts and circumstances described in your request and is given on the basis of your representation, express or implied, that you have provided a full and fair description of all the facts and circumstances that would be pertinent to our consideration of the question presented. Existence of any other factual or historical background not contained in your request might require a different conclusion than the one expressed herein. You have represented that this opinion is not sought by a party to a pending private litigation concerning the issue addressed herein. You have also represented that this opinion is not sought in connection with an investigation or litigation between a client or firm and the Wage and Hour Division or the Department of Labor. This opinion letter is issued as an official ruling of the Wage and Hour Division for purposes of the Portal-to Portal Act, 29 U.S.C. 259. See 29 C.F.R. 790.17(d), 790.19; Hultgren v. County of Lancaster, Nebraska, 913 F.2d 498, 507 (8th Cir. 1990).

We trust that the above information is responsive to your inquiry.

Sincerely,

Alfred B. Robinson, Jr.
Deputy Administrator

Enclosures

Note: *** The actual name(s) was removed to preserve privacy.

APPENDIX L

MEMORANDUM OF UNDERSTANDING BETWEEN CITY OF OAKLAND AND OAKLAND POLICE OFFICERS' ASSOCIATION

Provisions from Pages 31 – 32

Police Officer Trainee Training Costs. The parties recognize that in the past a substantial number of persons have accepted the benefit of training at the Oakland Police Academy and then have voluntarily separated from service to join other safety agencies or have decided for personal reasons that police work is not their preference. The purpose of this provision is to insure that the recruit either accept a commitment of service to the City or be responsible for costs associated with Academy training. Thus the parties agree that any member who, prior to completing five years of service, voluntarily separates from service[1] with the department shall be responsible for reimbursing the City, on a full or prorata basis, for the $8,000. cost of his or her training at the Police Academy. A schedule

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[1] A member shall not be deemed to have voluntarily separated under this provision if the member can demonstrate that at the time of separation a personal emergency or other extreme facts requiring an absence from service which could not be reasonably accommodated by either a leave of absence or a request for re-employment upon cessation of the emergency or extreme facts. A demonstrated health problem of member or of a person in the member's immediate family is an example of such an emergency.

of the member's reimbursement responsibility is set forth as follows:

Length of Service	% of Repayment Due
Separation prior to 1 year.	100% repayment of the $8,000.
Separation after 1 year but before completing the second year	80% repayment of the $8,000.
Separation after 2 years but before completing the third year	60% repayment of the $8,000.
Separation after 4 years but before completing the fifth year	20 % repayment of the $8,000.
Separation after 5 years	0% repayment

Repayment shall be due and payable at the time of separation and the City shall deduct any amounts owed under this provision from the employee's final paycheck. If said deduction does not fully reimburse the City for outstanding costs, the balance shall thereupon be due and owing.

APPENDIX M

OAKLAND POLICE DEPARTMENT
CONDITIONAL OFFER OF POSITION AS A
POLICE OFFICER TRAINEE

Candidate: **Hassey, Kenny D.**

Social Security Number: **XXX-XX-XXXX**

The City of Oakland Police Department hereby notifies you that you have been selected for a position as a Police Officer Trainee, subject to the following conditions: you must pass the required psychological test(s), medical examination(s), the remainder of the background investigation, and accept the training reimbursement provisions as specified below.

Reimbursement provisions: You may be required to reimburse the City of Oakland for training expenses. Reimbursement would be required in the event you voluntarily terminate your employment with the Oakland Police Department, according to the following schedule:

Before the end of year 1 - 100% repayment of $8,000.
Before the end of year 2 - 80% repayment of $8,000.
Before the end of year 3 - 60% repayment of $8,000.
Before the end of year 4 - 40% repayment of $8,000.
Before the end of year 5 - 20% repayment of $8,000.

Additionally: Police Officer Trainees shall be required, on or before the first day of employment, to reside within a geographic emergency zone that allows quick response from home to work. Individuals selected for hire will be required to certify and verify by declaration, under the penalty of perjury and risk of removal from consideration for employment, their knowledge of and compliance with this City of Oakland policy. (A list of the cities within the established residency zone is enclosed for your information.)

Signature: s/ Date: 10 DEC 97
Chief of Police

CONDITIONAL OFFER OF POSITION AS A POLICE OFFICER TRAINEE (CONTINUED)

Candidate: **Hassey, Kenny D.**

Social Security Number: **XXX-XX-XXXX**

Please advise whether you accept this conditional offer:

X Yes, I accept this offer, and understand the conditions which attach to it.

_ I am no longer interested in the position of Police Officer. Trainee.

Signature: s/ Date: 10 DEC 97

Print Name: s/ HASSEY KENNY D.
(Last Name) (First Name) (Middle Initial)

Keep one copy of this form for your records. Indicate your response, sign the form and return the signed original within 7 working days of receipt. Failure to return the form will be considered a rejection of this offer and will result in your removal from further consideration for the position of Police Officer Trainee.

Return the original to:

Personnel Section Commander
455 -7th Street, Room 514
Oakland, CA 94607

If you have questions, please contact the Recruiting and Background Investigations Unit Supervisor at (510) 238-3339.

APPENDIX N

City of Oakland
Police Services Agency
TRAINING COSTS REPAYMENT AGREEMENT

FILE
COPY

Police Services Agency
455 - 7th Street
ATTN: Personnel Section
Oakland, CA 94607

Employee Name: Kenny Hassey
Mailing Address: XXXX XXXXX XXXXXX
City/State/Zip: Richmond, CA 94805
Phone #: (510) XXX-XXXX
Social Security No.: XXX-XX-XXXX

In accordance with the Memorandum of Understanding between the City of Oakland and the Oakland Police Officers' Association, I hereby acknowledge that I am obligated to repay the City of Oakland for training costs incurred while I was employed as a Police Officer Trainee. The total amount owed to the City of Oakland is $ 8,000 , minus the amount of my final paycheck in the amount of $ 0, leaving a balance of $8,000.00.

I hereby agree to repay the balance owing in 24 monthly installments of $333.34. Monthly payments are due on the 1st of the month, commencing with the month of February, 1999, and shall continue on a monthly basis until the total debt has been paid. I further understand that I may repay the remaining balance at any time prior to the expiration of this contract. If I fail to make any monthly payment, the remaining balance will become due and payable immediately. Payments should be mailed to:

City of Oakland, Central Collections
P.O. BOX 12365, Oakland, CA 94604-2365
ATTN: Mr. Phil Lim

s/	
Employee Signature	Date
s/	2/16/99
Police Service Agency Approval	Date

APPENDIX O

PETITIONER KENNY D. HASSEY'S FINAL PAYROLL CHECK FROM THE CITY OF OAKLAND

TEXT OF PAYROLL STUB FOR CHECK IN THE NET AMOUNT OF $725.28:

HASSEY, KENNY D. LOC 1043XX
714315 PERIOD ENDING 2/19/99

SOCIAL SECURITY XXX-XX-XXXX

DESCRIPTION	HOURS	RATE	CURRENT	YTD AMT
SFT SWORN FULL TIME	40.00	23.39400	935.76	6550.32
CTR COMPTIME EARNED	1.00	23.39000	23.39	292.43
STRAIGHT GROSS.....	40.00		935.76	7234.60
FEDERAL WITHHOLDING TAXES			93.34 -	1209.22 -
FICA/MEDICARE W/H DEDUCTION			13.57 -	104.90 -

DESCRIPTION	HOURS	RATE	CURRENT	YTD AMT
STATE WITHHOLDING TAXES			18.57 -	364.69 -
UNION DUES - OPOA			77.00 -	154.00-
UNION - POLICE WIDOWS / ORPHANS			5.00 -	10.00-
PARKING SURCHARGE - OPOA			3.00 -	6.00-
714315 NET	40.00	725.28		5367.89

ANNUAL HOURS WORKED ACCUM	281.50	BALANCE
COMPENSATORY DAY	.00	BALANCE
COMPENSATORY TIME	59.50	BALANCE
FISCAL YEAR HOURS ACCUMULATOR	1354.50	BALANCE
LIFE-TO-DATE HOURS ACCUMULATOR	1383.50	BALANCE
POLICE VACATION	130.00	BALANCE

APPENDIX P

PETITIONER KENNY D. HASSEY'S
RETROACTIVE PAYROLL CHECK FROM THE
CITY OF OAKLAND

TEXT OF PAYROLL STUB FOR CHECK IN THE
AMOUNT OF $654.80:

HASSEY, KENNY D. LOC 10431
739199 PERIOD ENDING 7/10/98

SOCIAL SECURITY XXX-XX-XXXX

DESCRIPTION	HOURS	CURRENT	YTD AMT
RTR RETROACTIVE NO RETIREMENT		1012.17	1012.17
RTR RETROACTIVE SBJ TO RETIRE		2.25	2.25
GROSS.....		1014.42	9799.28
ALTERATIVE FEDERAL TAX %		284.04 -	732.85 -
FICA /MEDICARE / W/H DEDUCTION		14.71 -	142.09 -
6% STATE WITHHOLDING		60.87 -	157.05 -
739199 NET.....		654.80	7023.38

DESCRIPTION	HOURS	RATE	CURRENT	YTD AMT
ANNUAL HOURS WORKED ACCUM	281.50			BALANCE
COMPENSATORY DAY	.00			BALANCE
COMPENSATORY TIME	.00			BALANCE
FISCAL YEAR HOURS ACCUMULATOR	1354.50			BALANCE
LIFE-TO-DATE HOURS ACCUMULATOR	1383.50			BALANCE
POLICE VACATION VACATION	.00			BALANCE

APPENDIX Q

TITLE 29, SECTION 531(d) OF THE UNITED STATES CODE OF FEDERAL REGULATIONS

Title 29, Section 531(d) of the United States Code of Federal Regulations which states in pertinent part:

(1) The cost of furnishing ``facilities'' found by the Administrator to be primarily for the benefit or convenience of the employer will not be recognized as reasonable and may not therefore be included in computing wages.

(2) The following is a list of facilities found by the Administrator to be primarily for the benefit of convenience of the employer. The list is intended to be illustrative rather than exclusive: (i) Tools of the trade and other materials and services incidental to carrying on the employer's business; (ii) the cost of any construction by and for the employer; (iii) the cost of uniforms and of their laundering, where the nature of the business requires the employee to wear a uniform.

APPENDIX R

TITLE 29, SECTION 531.32 OF THE UNITED STATES CODE OF FEDERAL REGULATIONS

Title 29, Section 531.32 of the United States Code of Federal Regulations which provides in pertinent part:

(a) ``Other facilities," as used in this section, must be something like board or lodging. The following items have been deemed to be within the meaning of the term: Meals furnished at company restaurants or cafeterias or by hospitals, hotels, or restaurants to their employees; meals, dormitory rooms, and tuition furnished by a college to its student employees; housing furnished for dwelling purposes; general merchandise furnished at company stores and commissaries (including articles of food, clothing, and household effects); fuel (including coal, kerosene, firewood, and lumber slabs), electricity, water, and gas fur nished for the noncommercial personal use of the employee; transportation furnished employees between their homes and work where the travel time does not constitute hours worked compensable under the Act and the transportation is not an incident of and necessary to the employment.

(c) It should also be noted that under Sec. 531.3(d)(1), the cost of furnishing ``facilities'' which are primarily for the benefit or convenience of the employer will not be recognized as reasonable and may not therefore be included in computing wages. Items in addition to those set forth in Sec. 531.3 which have been held to be primarily for the benefit or convenience of the employer and are not therefore to be considered ``facilities'' within the meaning of section 3(m) include: Safety caps, explosives, and miners' lamps (in the mining industry); electric power (used for commercial production in the interest of the employer); company police and guard protection; taxes and insurance on the employer's buildings which are not used for lodgings furnished to the employee; ``dues'' to chambers of commerce and other organizations used, for example, to repay subsidies given to the employer to locate his factory in a particular community; transportation charges where such transportation is an incident of and necessary to the employment (as in the case of maintenance-of-way employees of a railroad); charges for rental of uniforms where the nature of the business requires the employee to wear a uniform; medical services and hospitalization which the employer is bound to furnish under workmen's compensation acts, or similar Federal, State, or local law. On the other hand, meals are always regarded as primarily for the benefit and convenience of the employee.

APPENDIX S

TITLE 29, SECTION 531.35 OF THE UNITED STATES CODE OF FEDERAL REGULATIONS

Title 29, Section 531.35 of the United States Code of Federal Regulations which states:

> Whether in cash or in facilities, "wages" cannot be considered to have been paid by the employer and received by the employee unless they are paid finally and unconditionally or "free and clear." The wage requirements of the Act will not be met where the employee "kicks-back" directly or indirectly to the employer or to another person for the employer's benefit the whole or part of the wage delivered to the employee. This is true whether the "kick-back" is made in cash or in other than cash. For example, if it is a requirement of the employer that the employee must provide tools of the trade which will be used in or are specifically required for the performance of the employer's particular work, there would be a violation of the Act in any workweek when the cost of such tools purchased by the employee cuts into the minimum or overtime wages required to be paid him under the Act. See also in this connection, §§ 531.32(c).

APPENDIX T

TITLE 29, SECTION 778.104 OF THE UNITED STATES CODE OF FEDERAL REGULATIONS

Title 29, Section 778.104 of the United States Code of Federal Regulations which states:

> The Act takes a single workweek as its standard and does not permit averaging of hours over 2 or more weeks. Thus, if an employee works 30 hours one week and 50 hours the next, he must receive overtime compensation for the overtime hours worked beyond the applicable maximum in the second week, even though the average number of hours worked beyond the applicable maximum is the 2 weeks is 40. This is true regardless of whether the employee works on a standard or swing-shift schedule and regardless of whether he is paid on a daily, weekly, biweekly, monthly or other basis.